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ABSTRACT

Presentations, responses, and discussions of the conference sessions are transcribed. The topics addressed relate to faculty recruitment, promotion, and tenure policy and practice in higher education. The sessions covered: (1) historical background (Charles V. Willie, Patricia Roberts Harris, Harold C. Fleming); (2) federal regulations and case law (James D. Henry, Howard Glickstein, Howard Sherain); (3) HEW guidelines and actions (Peter Holmes, Mordeca Jane Pollock, William Taylor); and (4) the reactions of colleges and universities (Bernice Sandler, Manuel Guerra, Edgar F. Borgatta, Thomas Sowell, George Roche, Gertrude Ezorsky, Miro Todorovich, James C. Goodwin). (MSE)

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Affirmative Action In Employment in Higher Education

A Consultation Sponsored by the United States Commission on Civil Rights, Washington, D.C., September 9–10, 1975

ED144518

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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- Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and
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PREFACE

The U.S. Commission on Civil Rights, believing that a dispassionate, balanced discussion of the issues involved in affirmative action in employment in higher education would assist in developing a better understanding of those issues, called a 2-day consultation in Washington, D.C., on September 9 and 10, 1975. Scholars and other educational authorities who held differing points of view were invited to participate.

The Commission recognized that there are at least two major aspects to affirmative action in higher education: (1) policy and practice relating to student recruitment, admissions, and scholarship grants; and, (2) faculty recruitment, promotion, and tenure policy and practice. Owing to time restraints, the Commission chose to deal only with the latter.

In the months preceding the consultation, a considerable amount of national attention was focused upon affirmative action in employment in higher education. Numerous articles had appeared in the daily press, and some were to be found in scholarly journals. The White House had held informal, off-the-record meetings with scholars and administrators regarding affirmative action in faculty hiring at colleges and universities. The U.S. Department of Labor had held an "Informal Fact-Finding Hearing. . .to receive information concerning implementation of Executive Order 11246 affirmative action requirements as applied to employment at institutions of higher education."

The definition of "affirmative action" varies, depending on who (or what agency or institution) defines it. To some, affirmative action means "discrimination in reverse," or "special privilege" for minorities and women; to them, the goals and timetables of affirmative action are seen as "quotas." But the intent of affirmative action, according to its advocates, is other than this. They say that it is "results oriented" and that the existence of Federal, State, or local statutes against employment discrimination is insufficient to assure that minorities and women will benefit from equal opportunity programs. Such advocates believe that positive steps must be taken to assure that they will be represented in a work force, including college and university faculties.

In the introduction to the Potomac Institute's booklet, *Affirmative Action: The Unrealized Goal,* the following language appears:

> Affirmative action in employment can be defined as action taken, first, to remedy staffing and recruiting patterns which show flagrant underutilization of minorities and women as a consequence of past discrimination perpetuated in present employment systems, and, secondly, to prevent future employment discrimination which would prolong these patterns. . . .

The Commission hopes that all who read the proceedings of this discussion will develop a better understanding of the issues involved.

These proceedings were prepared by Frederick B. Routh, Director, and Everett A. Waldo, Assistant Director, of the Special Projects Unit, Office of National Civil Rights Issues, U.S. Commission on Civil Rights. Supporting staff assisting with the proceedings were Alma Missouri, of the Special Projects Unit; and Audree Holton, Deborah Harrison, Vivian Hauser, Rita Higgins, Vivian Washington, and Bobby Wortman, all of the Publications Support Center, Office of Management.

Mr. Routh served as coordinator of the consultation.

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AFFIRMATIVE ACTION IN EMPLOYMENT IN HIGHER EDUCATION

A Consultation Sponsored by the United States Commission on Civil Rights, Washington, D.C., September 9–10, 1975

First Session: Historical Background

The consultation was called to order by the Commission's Chairman, Arthur S. Flemming.

CHAIRMAN FLEMMING. The Commission, a number of months ago, decided to hold a public consultation on affirmative action in employment in higher education. We had reached this decision because we recognized that there were very important issues being confronted in this particular area. We felt that before arriving at findings and recommendations we would like to have the benefit of the thinking of people who have confronted the issues in this area.

I am not going to make any opening statement identifying these issues because they will be identified for us during the remainder of today and throughout our sessions tomorrow. The Commission looks forward to the opportunity of listening to these presentations and then engaging in dialogue with those who made the presentations.

The fact that this is a very live issue is indicated by activities on the part of various agencies and organizations. For example, just recently or early in August, there was released a report of the Carnegie Council on Policy Studies in Higher Education. The title of this report is *Making Affirmative Action Work in Higher Education.* The subtitle is: "An Analysis of Institutional and Federal Policies with Recommendations."

In addition to reading advance copies of the papers that will be presented to us, the members of the Commission have had the opportunity of reading this report. I am noting the report at this point and reserve the question of whether it should be made a part of the proceedings of this public consultation. The answer to that question will depend somewhat on information we receive as to the copies of

this report that may be made available. We regard it as an important report, and we are certainly going to utilize it in connection with our deliberations.

Also, I would like to take note of the fact that recently—again in the month of August—the Comptroller General of the U.S. issued a report entitled: *More Assurances Needed that Colleges and Universities with Government Contracts Provide Equal Employment Opportunity.* This is an oversight report dealing with the operations of the Department of Labor in this area and also the Department of Health, Education, and Welfare. Again, I am taking note of the report, reserving the question of whether or not we will make it a part of our formal proceedings.

In addition to that, a few weeks ago the Department of Labor held informal hearings under the supervision of an administrative law judge on the issues that are going to be considered today. That hearing was recessed and the Secretary of Labor has indicated that he would like to have the views of the Commission presented when the hearing resumes in the early part of October.

We will take into consideration the results of this consultation, the other reports to which I have referred, and we will, as a Commission, arrive at some findings and recommendations relative to the issues in this area.

The program calls for us, first of all, to take a look at the historical background. We are very happy that Charles V. Willie, professor of education and urban studies at Harvard University, responded to our invitation to prepare a paper on the historical background. As you have noted, when he has finished summarizing his paper, making any additional comments he desires to make, we will have reactions from Harold Fleming, president of the Potomac Institute, and Patricia Roberts Harris, a distinguished attorney in the District of Columbia. And now, Dr. Willie.

PRESENTATION OF CHARLES V. WILLIE

Charles Willie is my name, higher education is my game. I have been a faculty member of a college or university for nearly a quarter of a century.

Presently, I have a tenured appointment at Harvard University, where I was appointed as an instructor of sociology in 1952 before affirmative action was even a gleam in the eye of the Federal Government. Also, my first appointment at Harvard was as a visiting lecturer in the medical school for 1 year, 1966 to 1967.

At Syracuse University, I served in every faculty rank from instructor to professor. Moreover, I did my stint as chairman of the department of sociology for 4 years and became a full-time administrator in 1972, as vice president of the university, concerned with student affairs.

I share with you this biographical sketch of my career to indicate the extent of my experience in predominantly white institutions of higher education. One could say that I was present at the creation of affirmative action in higher education.

Despite my experience of one-quarter of a century in predominantly white institutions, I have deep roots in the black community and more than two decades of living in relatively segregated settings. I attended segregated public schools in Dallas, Texas, and graduated from Morehouse College, a traditionally black school in Atlanta, Georgia. It has been my good fortune, then, to develop a perspective on higher education from the vantage point of a student, teacher, and administrator. Moreover, during the course of my study, I have been a student in predominantly white and predominantly black schools.

I tell you these things because I believe, as has been pointed out in the past, that one's attitude and behavior are profoundly influenced by one's status in the social system. I have occupied different positions in different regions with different races in the system of higher education in this nation and shall analyze the history of affirmative action in higher education from a perspective that includes these experiences.

The history I present will be an informal one, an interpretative history. I am a sociologist, not a historian, and have not conducted a systematic investigation of affirmative action. For a detailed study, I refer you to such work as that of Richard Lester of Princeton University, who prepared a report for the Carnegie Commission on Higher Education entitled *Antibias Regulation of Universities, Faculty Problems and their Solutions,* published in 1974 by McGraw-Hill Book Company (Lester—1974).

As you know, Executive Order 11246, approved by the President in September 1965, provides that as a condition of obtaining Federal contracts, all contractors, including universities with research contracts, sign an agreement not to "discriminate against any employee or applicant for employment because of race, color, religion, or national origin." (Lester—1974, p. 3)

In June of 1972 the President signed into law Title IX, which amended the Civil Rights Act of 1964 to state explicitly that sex discrimination is prohibited as a matter of public law and that the prohibition against employment discrimination in Title VII of the Civil Rights Act, which exempted educational institutions originally, now applies to all of them, whether or not they have Federal assistance.

Moreover, the Higher Education Amendments of 1972 extended the provisions of the Equal Pay Act of 1963 to executive, administrative, and professional employees in colleges and universities (Committee on Education and Labor—1975, pp. 805, 1014, 1016).

The effective dates for Federal action, then, which rendered race and sex discrimination in higher education illegal and which provided

procedures for granting relief to aggrieved parties were 1965, 1968, and 1972.

It was during these years that affirmative action came of age. I should remind you that the Executive orders prohibiting discrimination because of race or sex by persons or agencies that do business with the Federal Government came approximately 100 years after the 14th amendment to the Constitution, which guarantees "the equal protection of the laws" for all persons (born or naturalized in the United States and subject to its jurisdiction).

It will be more meaningful if the history of affirmative action in higher education is discussed in the light of proposed changes in the law. I shall follow this approach.

In August 1975 the Carnegie Council on Policy Studies in Higher Education issued a report containing 27 recommendations. The full report, *Making Affirmative Action Work*, is published by Jossey-Bass, Inc., of San Francisco, California. *The Chronicle of Higher Education* (August 18, 1975, edition, pp. 3–4) is the source of the information about the recommendations which I shall discuss.

The most troublesome recommendations of the report were buried as recommendations 10, 11, 12, 13, and 15. My purpose in this discussion is to unearth these and to expose them to the cleansing sunlight of cross-examination.

Recommendation 10 of the Carnegie Council on Policy Studies seems to be of little consequence but on closer analysis is a passive copout. It states that "Institutions of higher education should emphasize policies and procedures that will provide opportunities for women and minorities to serve in administrative positions."

The sentiment of this recommendation is laudable, but the language is lamentable. It is too mild and permissive. In a recent speech at the 70th annual meeting of the American Sociological Association in San Francisco, Benjamin Payton, a program officer of the Ford Foundation, called for more minorities and women in management positions in foundations and other organizations. He said that their presence in these organizations at this level probably is more important than serving as trustees or as members of the board of directors. The management level is where the action is in most organizations, he said.

Although administrators operate within the guidelines provided by higher authority, their recommendations for action are accepted more frequently than they are rejected. Not only for the benefit of the college or university as a whole but also for the benefit of newly-recruited minority and women students, persons other than white males *must* be added to the management staff of colleges and universities.

My study of *Black Students at White Colleges* indicates that black administrators frequently provide the only link of trust between

predominantly white institutions and minority students. (Willie and McCord—1972, p. 59)

Must is a stronger word than the indecisive phrase "higher education should emphasize policies and procedures. . .," which was contained in the report of the Carnegie Council.

The president and fellows of Harvard, in a statement of "Reaffirmation of the University's Policy Concerning Nondiscrimination and Equal Employment Opportunity" (dated November 15, 1971), said, "It is not sufficient merely to have a policy." How well they spoke.

In March 1975, 3-1/2 years after the statement of the president and fellows was issued, Walter Leonard, special assistant to the president and the university's affirmative action officer, said, "We have. . .had a great deal of trouble and have been forced into confrontation with department heads on listing of high-level administrative positions [with the personnel office]."

Leonard stated that "the listing policy seeks to expand the traditional applicant pool and to assist departments in searching for talent in hitherto unexplored or ignored areas." Further, he said, "the policy is one viable method of assuring that the buddy system of hiring, which perpetuates the hiring of white males only, is not the only avenue used. . . ."

Leonard found other deficiencies 3 years after the first affirmative action program under the Bok administration had been submitted by Harvard to the Office for Civil Rights. There was no minority representation in the office of the governing board of the university and a "continuing absence" of minorities and of women from high-level positions in the development office (Leonard—March 14, 1975, pp. 8–9).

The Harvard University statement issued in 1971 was on target; it is not sufficient merely to have a policy of equal employment. Harvard had a policy, but the affirmative action officer on campus found a lack of commitment to implementing it. In fact, he found the prevailing attitude among administrators with reference to affirmative action recruitment procedures to be this: "How little can [I] do [to fulfill the requirements of the policy]. . .since I already have a candidate." In most cases, Harvard's affirmative action officer said, the candidate was a white male. The recruitment practice made the affirmative action policy a sham. (Leonard—March 14, 1975, p. 9)

Hence, the Carnegie Council's recommendation is too little and too late. More than mere emphasis on policy and procedures is needed if more women and minorities are to be employed as administrators in colleges and universities. My personal experience as well as that reported for Harvard indicates this.

At one time in its history, Syracuse University had two black vice presidents in its administration. This was not due to a policy but to a power play. The president and chancellor of the university asked me to

join central administration as vice president for student affairs. I would have been the only black administrator in the chancellor's cabinet.

Despite the fact that my responsibility was in the area of student activities and organization, I knew that all of the minority concerns before the central administration somehow would find their way to my desk too if I permitted myself to become the only high-level minority administrator in the university. I suspected that my race as well as my talents were among the reasons I was invited to join central administration. My reason for suspecting this was due to the fact that the only woman vice president of Syracuse University back in 1971, when I was approached, also was located in student affairs. She was in charge of residential life.

To protect my own interest in student affairs and to promote further diversity, I made the appointment of a vice president for affirmative action a condition for my accepting a position within the Syracuse central administration. My condition was supplemented by a resolution from the black faculty and professional staff and its several negotiating sessions with the chancellor calling for a vice president for affirmative action.

The chancellor agreed to this arrangement, since the university did not have an affirmative action officer at that time. A search was conducted and a black Harvard Law School graduate was appointed to the newly-created office of vice president for affirmative action at Syracuse University in 1972.

The condition for my coming into the central administration and the activity of the black faculty and professional staff were an internal part of the power play. The enforcement effort of the Federal Government was an external part of the power play. Colleges and universities tend to act and to act affirmatively with reference to the employment of women and minorities when internal and external pressures are in concert.

Walter Leonard said:

> It is clear from statistics here at Harvard that educational institutions moved one step closer to the practice of the principles of equal employment opportunity and affirmative action only at a time that the Federal Government was functioning as a reviewer of civil rights practices of these various institutions. It is also clear that the most intensive efforts by the Federal Government were between the years 1970 and 1973. (Leonard—1975, p. 9)

The Carnegie Council, therefore, should have called for new enforcement efforts by the Federal Government and new initiatives by women's and racial minority groups within colleges and universities in accordance with policies that already exist. A basic principle of social change is that those who suffer oppression, including rejection and exclusion as worthy administrators of colleges and universities, will

continue to be oppressed until they decide to cease cooperating in their own oppression. I know this principle to be true because my resignation as an administrator at Syracuse University was in part a fulfillment of it. I will discuss this matter later in another context.

The report of the Carnegie Council on Policy Studies in Higher Education is filled with notions of what Federal and State governments and colleges and universities as corporate authorities should do in behalf of women and minorities. The report is strangely silent on what these groups must do themselves. Yet, I know from personal experience as an individual who grew into adulthood during the middle of the 20th century that Federal and State governments and whites in general did nothing to get blacks off the back of the bus—despite the presence of the 13th and 14th amendments to the Constitution, which eliminated slavery and involuntary servitude and guaranteed all equal protection of the laws.

Until blacks, through Rosa Parks, decided to cease cooperating in their own oppression, segregated seating continued. She refused to give up her seat to a white person and move to the back of the bus. Her act of personal resistance was the beginning of the movement in Montgomery, Alabama, in 1955 that finally ended officially-sanctioned segregation in the area of public accommodations.

Indeed, the practice of excluding blacks from matriculating as graduate students with full rights and privileges to participate in all aspects of the learning experience of professional schools in the South was not ended because of a new policy emphasis by these schools. It ended because of a challenge by members of the minority population, a favorable decision by the Supreme Court, and enforcement of the law by the Government.

Texas created a separate law school for Sweatt in response to his effort to enroll in the University of Texas Law School. In *Sweatt* v. *Painter* [339 U.S. 629], the U.S. Supreme Court ruled in 1950 that this arrangement was inadequate in that the segregated school for blacks did not have "traditions and prestige" and that it further contributed to "isolation" and did not facilitate "the interplay of ideas or the exchange of views" with the dominant majority.

The University of Oklahoma admitted McLaurin to its graduate school and eventually let him use "the same classroom, library and cafeteria. . ." but insisted on assigning him to a seat or a table designated for "colored" students. In 1950 the Supreme Court ruled in *McLaurin* v. *Oklahoma State Regents* [339 U.S. 637] that setting McLaurin "apart from the other students" would impair and inhibit his ability to study and engage in discussions and exchange views with other students and hence was unconstitutional. (Notre Dame Center for Civil Rights—1975, p. 3)

I digress to elaborate upon these happenings at midcentury to demonstrate the dual contribution of challenge and response to social

change. Policies and procedures are of value, but they are not enough; they do not displace challenge in the scheme of social change.

In fact, they probably develop only as part of an appropriate response to an effective challenge. The mild and permissive language of the Carnegie Council about emphasizing policies and procedures that will provide opportunities for women and minorities to serve in administrative positions appears to be the plaintive call by those who want rain without thunder and lightning and who want new crops without plowing and tilling the soil. Years ago, Frederic Douglass, ex-slave and great black statesman, reminded us this could not be.

Recommendation 11 of the Carnegie Council on Policy Studies in Higher Education, with reference to the appointment of instructors and assistant professors, calls for goals and timetables as well as strictly nondiscriminatory policies for each department. This recommendation commits the sin of omission by exempting departments from a requirement of developing goals and timetables for tenured appointments. By eliminating tenured or senior faculty appointments from the promises which departments make regarding their intention to diversify the faculty, the Carnegie Council in effect is promoting selective justice.

Selective justice, of course, is no justice at all. Moreover, it is a thinly-veiled attempt to keep middle-class, middle-aged, white males in charge of the higher educational establishment. Decisions about the promotion and retention of junior faculty usually are reserved for action by the senior faculty who are tenured. These decisions are based on analysis of facts and judgment about performance or potential of scholarly performance.

In effect, the senior faculty at most colleges and universities operate as a jury before which the accomplishments of younger members in the profession are paraded. They are weighed and considered, and a thoughtful decision eventually is rendered. Because judgment is a factor in such decisions, it is necessary and essential that different perspectives are present among the decisionmakers if the decisions they reach are just and fair.

Without appropriate diversity in the senior tenured faculty, the opportunity to become a member of this group on the basis of merit is likely to be extended only to those members of the junior faculty who are made or who fashion themselves in the image of their seniors. If the senior faculty is not diversified in terms of the race and sex characteristics of its members, it should be as a matter of policy, as the court requires such diversity in juries. To accomplish this requires the setting of attainable goals and a commitment to their fulfillment.

At Harvard University, Walter Leonard states that "we have had an overall net gain of only four black assistant professors [between October of 1971 and March 1975]." He describes this picture as "bleak and discouraging" and asks why there has not been a better perfor-

mance in recruiting and retaining racial minorities on the junior faculty. Then he states that the senior faculty of tenured professors consists of 766 at Harvard, 20 of whom are women and 36, minority males. They are less than 8 percent of the tenured faculty. Herein lies the answer to his question. Senior faculty have a great deal to say about who becomes and is retained as junior faculty and eventually promoted to senior faculty rank.

There must be a change in the kinds of people who are senior faculty if there is to be a corresponding change in the kinds of people who are invited to join the junior faculty. The trickle-up principle is even less effective than the trickle-down idea of social change. Few women and racial minorities are likely to be promoted from the ranks of junior faculty to senior faculty if their seniors are exclusively male and white.

As recommendation 11 of the Carnegie Council also indicates, "A search for outside candidates for tenure appointments will be appropriate in many situations." This search will be initiated and continued only if there is a firmly-stated goal and a timetable for the implementation of the goal.

For example, the graduate school of education at Harvard identified in 1969 the appointment of a tenured professor proficient in the area of urban education as a goal to be fulfilled. It carried on a continuous search for 5 years and would have despaired had the goal not been publicly stated. With reference to the department of history and the department of English at Harvard, the affirmative action office said in March 1975, "It is. . .difficult to explain or believe that [they] cannot find a black man or woman in the entire country with the qualifications to hold a tenured position in their august departments." (Leonard—1975, p. 9)

My experience at Syracuse University as one of the original members of the affirmative action committee was similar to the Harvard experience. Departments which set goals tended to fulfill them; departments that did not, tended to drag their feet. For example, in the early days of affirmative action, the religion department of Syracuse University was resentful of our inquiries into why no women or minorities were senior faculty members.

On the other hand, the sociology department welcomed the requirements of affirmative action, chose diversity as a goal, had a black chairperson from 1967 to 1971, two other black faculty members, and a woman of Japanese American ancestry. The experience of the department of sociology at Syracuse University in the past is not different from that of the department of sociology of the University of Massachusetts in Boston today where there is a black chairperson, and other minorities and women on the department faculty in all ranks; the same may be said of the University of Pennsylvania's department of sociology today, where a woman is in charge as chairperson.

Where there are minorities and women in positions of power on the senior faculty, sometimes it makes a difference in the faculty profile at all professorial ranks.

These selected experiences indicate why it is important to have women and minorities as members of the tenured faculty. This cannot be accomplished without goals and an appropriate timetable. Without such, most departments will follow their customary procedures and recruit their conventional candidates. By stating goals for diversifying the tenured faculty and deliberately searching for candidates, the faculty is forced to reflect upon its definition of excellence and to determine if it is too narrow.

By exempting tenured faculty appointments from the full affirmative action process, the Carnegie Council's recommendation would open the door to further abuses in the area of institutional racism and institutional sexism. Thomas Pettigrew has stated that "institutional racism is extremely difficult to combat effectively. . . ." He goes on to say that:

> Many of these arrangements, perhaps even most of them, were originally designed and established to serve positive functions for the institution without thought of their racial implications. They have been used precisely because they do in fact accomplish these positive functions. Thus, Harvard University in the 1930s set up a variety of meaningful criteria, including publication of scholarly works, to select their tenured faculty. The aim was praiseworthy—namely, to ensure a faculty of high quality. Yet the publishing requirement effectively acted to restrict the recruitment of black professors, for most of them carried heavy teaching loads in predominantly black colleges, which limited their time to write. Not surprisingly, then, Harvard University in the 1960s found itself with only a handful of black faculty members. Yet the University is understandably loath to give up a selection procedure that has served its intended function well, though its unintended racist consequences are a matter of record. This example can be repeated almost endlessly in American society. The problem, then, is not simply to eliminate racist arrangements, difficult as that alone would be, but to replace these arrangements with others that serve the same positive functions equally well without the racist consequences. (Pettigrew—1973, pp. 275-76)

Pettigrew, a Harvard professor, said that he used the Harvard example because it is close to his experience. He said, "It. .illustrates how each of us can find prime examples of institutional racism in our immediate lives," and he urges individuals who ask what they can do personally to combat racism "to work for structural change in the very institutions of which they are participants."

For instance, as a transitional device to encourage intransigent departments to seek minority candidates, he states that the university could set aside a certain portion of faculty funds which would be made available only to those units that find competent minority faculty

members. This way, Pettigrew believes, the competitive system within the university for funds would be inverted, and departments would have a financial incentive to find new kinds of faculty members. Some may disagree with this approach, but it or other creative devices may be necessary in the interim before there is full-scale commitment to affirmative action by all departments for all faculty ranks.

The exemption of tenured appointments from affirmative action's goals and timetables, as recommended by the Carnegie Council, would indirectly sanction the institutional racism and sexism that presently exist in higher education and would delay the search for new and ingenious ways of overcoming these unjust forms of exclusion and oppression. In effect, the recommended exception of tenured faculty appointments not only would perpetuate institutional sexism and racism but would slow down and in some instances cancel the beginnings of institutional change. The tenured faculty sit at the top of the academic power hierarchy and tend to call the shots. They, therefore, need to be diversified.

Recommendation 12 of the Carnegie Council on Policy Studies in Higher Education states that "timetables should be set for periods not exceeding 5 to 10 years. The institution should make good-faith effort to achieve its goals for additions of women and minorities to the faculty during that period." A simple response to this recommendation is a long-standing legal principle that justice delayed is justice denied. If segregated education (including a segregated faculty) is inherently unequal education and, therefore, unconstitutional as determined by the Supreme Court, now is the time for the United States to abide by its Constitution. This is what law and order is all about.

Some who call for a gradual approach do so not as a way of evading change. They know that Robin Williams, Jr., and Margaret Ryan published in a book entitled *Schools in Transition* more than two decades ago the finding that opportunity for planning before implementation of decrees governing desegregation tends to result in the impact of the idea of impending change being absorbed before the event actually occurs. (Williams and Ryan—1954, p. 239)

While this finding supports a gradual approach of slowly phasing in desegregation change, Williams and Ryan also discovered that opportunity for planning before implementation of decrees governing desegregation may give opportunity for opposition to crystalize and for community cleavage to develop. (Williams and Ryan—1954, p. 239)

It is valid both to slow down and to hurry up social change, particularly change in education pertaining to race and sex segregation. The rate of change employed—slow motion or fast movement—depends largely on the circumstances and situations and what one hopes to achieve.

It was the 1968 Executive order that launched affirmative action in higher education for women as well as racial minorities, and the 1972

amendments which brought all employment practices of all colleges and universities under its requirements. Thus, affirmative action on a comprehensive basis is at best 3 years to 7 years old. It is too soon to radically tinker with the requirements of the law or to slow down enforcement efforts.

In the light of the *DeFunis* case arising out of the effort of the University of Washington Law School to diversify the racial composition of its student body, and on the basis of commentaries prepared or in preparation by the American Council on Education, the Association of American Universities, the Carnegie Council on Policy Studies in Higher Education, and others, one might conclude that further delay in the implementation of affirmative action—say, 5 to 10 years--would encourage the development of opposition and greater cleavages among groups that formerly stood together against oppression.

If the kind of reaction persists which was given in testimony before the House of Representatives' special subcommittee on education in August and September of 1974 and which has been reported of others in the columns of *The Chronicle of Higher Education* (Cheryl Fields—August 18, 1975, p. 3), then we are in for tough sledding. The opposition mounting already is severe but often disguised in genteel language, although the affirmative action law in its comprehensive form is only 3 years old. What would such opposition be like after 5 to 10 years of indecisive action, as recommended by the Carnegie Council?

The retreat from the support of affirmative action has caused such persons as Walter Leonard, who is a lawyer, to state, "I personally fear that we are witnessing the end of the Second Reconstruction. Again, the 'good people' are doing little, if anything, to arrest this unfortunate trend." (Leonard—March 14, 1975, p. 8)

Based on this analysis, I am inclined to be guided by two other principles set forth by Williams and Ryan in their study of community decisionmaking pertaining to school desegregation. First, they state that "a clear definition of law and policy by legitimate school authorities may reinforce willingness to conform to the requirements of new situations." Hence, the great importance of clarity and decisiveness in early policy and practice in the desegregation process cannot be overemphasized. Second, Williams and Ryan point out that, "Long drawnout efforts and fluctuating policies appear to maximize confusion and resistance." If they were pushed to recommend a more effective approach with reference to affirmative action in general, I believe they would opt for "a clearcut policy, administered with understanding but also with resolution. . . ." (Williams and Ryan—1954, pp. 247, 242)

To permit delay in fulfillment of the goals for affirmative action by a college or university for 5 to 10 years, as recommended by the Carnegie Council, would diminish the "moral capital" of colleges and universities and reveal them to be self-centered agencies concerned

with justice and d[illegible]ncy only to the extent that these are required in the operations [illegible]ems other than higher education.

In 1972 and 1973, Richard Lester points out, university administrators grumbled about the requirements of affirmative action and the pressures they received to abide by the law but were not in a strong position to resist. Morally, university personnel were "on the defensive," according to Lester. He states that, generally, "[University administrators] and their faculties favored Federal action against race and sex discrimination in employment. It would have been difficult for them then to argue that antidiscrimination regulation under Federal contracts was appropriate for industry but not for universities. . . ." (Lester—1974, p. 133)

Colleges and universities can cop out if they wish on affirmative action, using a disguised stretch-out method, professing to do in 5 to 10 years what should and could be done now. But such a copout will have negative consequences for colleges and universities elsewhere; it will tarnish their image as free institutions, believing in beauty and seeking truth.

Their image will be tarnished no less than that of some religious organizations in the United States which are embroiled in controversy pertaining to an affirmative action matter of whether or not women can seek work as priests in the church. The learned leaders of the church may rationalize discrimination against women. Nevertheless, they look pretty silly sealing off the pulpit to women priests and barring them as celebrants from the communion table.

Their approach symbolically is not unlike that of standing in the schoolhouse doorway to prevent blacks from entering. Especially do they look silly doing this when one recognizes that the members of religious organizations were some of the most ardent advocates for the 1964 Civil Rights Act, which made it unlawful for business to discriminate in employment.

The negative public response to a religious system that has defaulted on its advocacy of justice by not including women in all aspects of religious life will be no less than the negative public response to a discriminating system of higher education, if it should default of its search for truth by excluding women and minorities from some opportunities in the learning environment.

The time for truth and justice is now. The stretch-out form of the copout will not work. Colleges and universities do not need 5 to 10 years to fulfill their affirmative action plans.

An interesting finding of the *Annual Audit of Graduate Departments of Sociology*, authorized by the American Sociological Association, shows the progress of affirmative action to date in sensitizing the members of that profession to ways of recruiting minorities and women. During a 3-year period from (the school year) 1972–73 to 1974–75, the percentage of departments that reported difficulty in

locating women and minority scholars was reduced by one-third to one-half of the previous percentage points.

In 1972–73, 80 to 85 percent of the sociology departments said they had difficulty in locating minorities—male or female; but this percentage dropped in 3 years to a figure of 50 to 55 percent. With reference to women, the percent who had difficulty in locating such scholars dropped from 32 to 15 percent during the same 3-year period. (Joan Harris—January 1975, p. 4)

The locating of minorities that looked like an impossible job once upon a time now is becoming easier so far as sociology is concerned. And the ease with which departments are able to find minorities has occurred within a period of 3 years, not 5 to 10 years.

Recommendation 13 of the Carnegie Council on Policy Studies in Higher Education states:

> the Department of Labor—in consultation with the Department of Health, Education and Welfare—should develop a special supplement or set of interpretations to [the Department of Labor's] Revised Order Number 4 that will be especially appropriate for higher education. . . . Data requirements should be revised to reflect the modified provisions. . . . [For example,] separate data should not be required on. . .tenure [and] transfer (reassignment). . . .

I already have spoken about the need to keep tabs on the affirmative action process with reference to the appointment of tenured professors. My remarks at this time will be restricted to the need to keep the transfer or reassignment process under affirmative action surveillance too. The experience I share is personal.

The black faculty and professional staff of Syracuse University lodged a charge against Syracuse University alleging that "Blacks are discriminated against because of their race with respect to [the university's] hiring, classification, promotion and discharge policies." The District Director on behalf of the Equal Employment Opportunity Commission issued a determination as to the merits of the charge in a memorandum dated March 17, 1975, which presented these findings:

> In 1973, [Syracuse University] named a white male to the position of Vice Chancellor of Student [Programs], bypassing a Black faculty member. Both individuals had impressive academic backgrounds, but the Black faculty member had 22 years of experience at [Syracuse University], as opposed to 1 year for the white faculty member. Although [Syracuse University] alleges that this was not actually a promotion, it appears that this action was responsible, at least in part, for the Black faculty member leaving [Syracuse] University. Based upon the above information, a determination of cause is found with respect to [Syracuse University's] promotion policies.

I am that black faculty member who resigned as vice president of student affairs and professor of sociology at Syracuse University when the chancellor was unable to explain why my 6 years as an administrator at the university (2 as a vice president and 4 as a department chairman) and my 22 years as a teacher did not qualify me for the position of vice chancellor.

My administrative talent had been tested; my scholarship, observed. Moreover, others in central administration had careers in higher education similar to my career. The chancellor and vice chancellor for academic affairs, for example, had been department chairmen, as I had been, before moving into central administration full time. In addition, my experience had been enlarged by three periods of leave—one, to serve as a faculty member at the State University of New York Upstate Medical Center; a second to serve as a visiting lecturer at the Harvard Medical School; and a third to serve as a research director of a Federal delinquency prevention project in Washington, D.C.

My affiliation with Syracuse spanned a period of 25 years, for I came to the university in 1949 as a graduate student and received my Ph.D. degree in 1957. I like the life of a scholar, enjoy teaching and doing research. It was my loyalty and commitment to the university that contributed to my decision to withdraw from teaching on a regular basis and accept an appointment in the central administration.

Beyond the vice presidents in the decisionmaking hierarchy of the university, there were four vice chancellorships and the chancellor and president, a combined office. I did not object to reporting to a vice chancellor, for I worked well with the person in that role who had been at the university about as long as I.

When the occupant of the office of vice chancellor for student programs decided to return to teaching, many within the university believed that I would receive the next appointment. There was no reason to expect another arrangement, since my interpersonal relations with the chancellor and the other vice chancellors were good; my knowledge of the university and its affairs was extensive; my administrative ability had been tested; and my commitment to the university was unquestioned.

The memorandum of determination of the Equal Employment Opportunity Commission concluded that there was reason to believe the charge that racial discrimination was the basis for not promoting me to the office of the vice chancellor.

As I began to push against the top as a candidate for one of the five positions in charge of all administrative operations of the university, racism reared its ugly head. For the first time in nearly a quarter of a century of affiliation with Syracuse, I experienced an artificial barrier which prevented me from serving the university to the fullest of my ability.

I could not trust an administration that restricted the opportunities available to its members on the basis of race. Having made a determination that the administration was untrustworthy, I resigned as vice president for the purpose of returning to teaching.

The chancellor was reluctant to accept my resignation. I believe it was as painful for him to accept it as it was for me to offer it. But we both knew that we had no alternatives after the act had been committed. The chancellor steadfastly defended his appointment as an administrative reassignment and not a promotion for the new vice chancellor. This way he could claim that no one was bypassed for any position; the administrative team was merely reshuffled.

Because this personal experience is about a university that has meant a great deal to me and my family, I am uncomfortable sharing it with you. Yet the story must be told to demonstrate why the Carnegie Council's recommendation to eliminate data on transfers or reassignments as a requirement of the affirmative action plan is inappropriate. Such a happening as I have shared with you would go unmonitored if the council's recommendation were accepted.

Recommendation 15 of the Carnegie Council on Policy Studies is the final one that I will comment upon. It recommends that an institution which demonstrates that its proportions of women and minorities among faculty members and other academic employees approximate pools of qualified persons and are well distributed throughout the institution should be exempted from requirements calling for continuous reassessment of goals and timetables and from detailed reporting requirements relating to academic employment.

One observation against this recommendation is that few problems are solved once and for all time by individuals or institutions. All should be anxious about keeping honest. The periodic audit is one method of keeping that way.

In his report to the annual meeting of the associated Harvard alumni on commencement day 1975, President Derek Bok set forth the best case for affirmative action monitoring that I have heard. While he counseled against "ill-advised Government restraint," at the same time he acknowledged that "private universities will not necessarily meet their obligations to society if they are left entirely to their own devices." For example, he said:

> Universities [did not] provide adequate opportunities for women or minority groups until the Congress required them to do so. It would be folly to assume that the Government will not continue to intervene or to content ourselves with the last-minute efforts to block legislation and preserve the status quo.

President Bok called upon colleges and universities:

> to seize the initiative and help to devise new mechanisms that will enable [higher education] to work with the Government to insure

> that universities respond to public needs without being subject to restrictions that ignore [their] special circumstances and impair [their] ability to be of continuing use to society. (Bok—1975, p. 4)

These remarks seem to me to point toward a more sensible approach than one of continuing to lobby for the exemption of higher education from affirmative action requirements. The pressure for suspension of continuous reporting is a call for return to the status quo. Remember that in the past higher education did not provide adequate opportunities for women or minorities until the Federal Government required it to do so. It is too soon to talk about eliminating governmental surveillance of an unjust condition in the body politic. To return to the status quo is to return to race and sex discrimination, a record of which colleges and universities should be ashamed. Hence, this recommendation of the Carnegie Council should be rejected.

Some might consider my present appointment at Harvard as a position of advantage. Personally, I consider it just another opportunity to serve. But let us accept the public evaluation of a Harvard professorship for the sake of this analysis and examine how it fits into the scheme of things, including affirmative action and race relations.

First, I have to endure the insults of many white well-wishers whom I thought were my friends. Upon hearing of my appointment, one said, "I don't know whether I should congratulate you or envy you"; another said, "I wish I were black."

The truth of the matter is that my appointment at Harvard is an indirect consequence of the continuing practice of race discrimination in higher education in America. First, I had no intention of leaving Syracuse University until it rejected me as a person because of my race. Had my experience and skill been recognized in the central administration in that university in central New York, I would not have considered relocating in Cambridge. Indeed, the opportunity came my way when I was visiting lecturer in the Harvard Medical School. I turned it down and returned to Syracuse to lead the department of sociology.

If 1973 was my first experience of race discrimination in employment during the course of my career in higher education, 1974 was soon to follow. When news spread that I had planned to return to teaching on a full-time basis, a major university in the Northeast whose name I shall not reveal inquired if I might entertain an offer for a tenured appointment in the department of sociology. It was a generous offer and a good department. I would have accepted had it come earlier than the May date when it arrived.

My campus interviews were in November and all was progressing well until the recommendation for my appointment reached the dean's advisory committee. There, a dispute erupted about my academic

credentials. The pressure by the sociology department to get my appointment approved was resisted by the advisory committee.

One white person who was a member of that committee called it "an abuse of academic freedom in the name of affirmative action." Such a charge was made of my candidacy even though at that time I had written or edited about six books and had authored several chapters in books and more than 30 articles which were published in scholarly journals. Also, I was a fellow of the American Sociological Association, president-elect of the Eastern Sociological Society, a member of the Social and Behavioral Sciences Assembly of the National Research Council, and a member of the executive committee and board of directors of the Social Science Research Council. In addition, I had been elected to Phi Beta Kappa and had received two honorary degrees as well as an earned doctorate degree in sociology.

This faculty member at the university had not read my writings, would not believe my references, and could not assess my reputation. All this person could see was my race. That was the basis for the negative reaction. The dispute resulted in a delay. Consequently, an offer was not made until the month of May. By that time, Harvard had come into the picture.

Had the offer come earlier from the other university, I believe that I would have accepted. The offer was delayed because of racism in higher education. This became my second experience. Harvard made a more rapid evaluation of my qualifications. I decided to cast my lot with it. It is because of this that I can honestly say that my appointment at Harvard never might have been had racism in higher education been put to an end. This has been my personal history of affirmative action in higher education.

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CHAIRMAN FLEMMING. Thank you very much, Professor Willie. Professor Harris, we would be very happy to have your reaction at this point.

RESPONSE OF PATRICIA ROBERTS HARRIS

MS. HARRIS. Well, I am happy to be able to react to this paper. There are only two things in it with which I disagree.

The first is the citation and recommendation of the Lester book, which I must disavow as either a report to, or a report of, the Carnegie Commission, of which I was a member. As the date reveals, it was published in 1974, about a year after the Carnegie Commission had its last meeting, and it was a study of which I knew nothing, and, in conversations with my fellow commissioners, which they apparently knew nothing of, save for Chairman Kerr.

I personally had great difficulty with the book and I would hope that any judgments made on this important subject weren't made on the basis of the Lester materials and questionable projections; but certainly as a member of the Carnegie Commission, I don't wish to be charged with any responsibility for it.

My own disagreement is of equal weight and that is with your surprise at the question of the Carnegie Council's recommendations. After all, these were the foxes in the henhouse and we ought to be delighted that the council came forward with some basically affirmative recommendations, in light of the Lester reluctance, and the fact that they recognized that the hens do need some protection against the foxes, I think, is something for us to be delighted with.

In my judgment, Dr. Willie's paper was superb, and the most important parts were those final pages which gave the experience of an individual who is "qualified," which is the term that we are consistently hearing as the necessary ingredient to the achievement of affirmative action.

I would submit that with respect to the dissenting member of the advisory committee, Dr. Willie was in the same position as the gentleman who appeared before this body, if my memory is correct, in Mississippi and said he was asked how many bubbles there were in a cake of soap. There is nothing, no qualification that is adequate for a faculty that does not want to share what I call the benefits of academic

life at the university with any newcomers and particularly not with black newcomers.

Now, I think I ought to enter here something in the nature of a modification. I am the director of a large university, a large urban university, with a national student body, which, at the last time a report was made to the board at my request, only had a single full professor who was black. The statistics showed there were five minority full professors, but as some of you may know, I am not shy, and I am not easily convinced, and I wanted a breakdown on what the minority status was. If my memory serves me correctly, four of the five—I may be off by one—were Chinese or Japanese or Indian and the fifth was a black former student and colleague of mine, who at the time, by the way, was on leave and had been for a couple of years.

I must say that as one who is deeply concerned by this and who consistently asks for this kind of report, I feel very frustrated about securing an improvement in our university's affirmative action program. I am deeply concerned. My concern is well enough known that when the members of the president's cabinet, who meet with us, come in to report on faculty, they very quickly assure me they have done everything they can before I ask the question.

What I think is missing is a governmental policy that either imposes penalties or assures benefits for a more aggressive action in improving the mix of personnel, both those teaching young people and those administering the programs for the institution. There is no substitute for it. I personally believe that the academic community, which certainly has been in the forefront in engineering the change in American attitudes towards blacks, has fallen short in beholding the beam in its own eye.

While I at times tend to agree with Irving Kristol about the manipulative quality of the academic community, I think it certainly is a quality which can be changed with respect to the implementation of affirmative action. They are prepared to manipulate the rest of the society, but not to take the consequences for themselves. I had too many conversations with people who—you will forgive me; it is unseemly for a woman commentator—who are what I call "the new Hookers," which describes the Sidney Hook adherents in our society, who find all kinds of different reasons for denying the existence of people like Dr. Willie.

I don't think that it is possible to rely upon good will or intellectual justification of doing right, because people's basic interest is in maintaining really good work conditions—and I have been a professor, and I have been a lot of other things, and it is like rich and poor. Being a professor is better because one is free of everything except one's students. Sometimes that is not enough freedom, but it is better than nothing. And it is a very good job to have, and one would rather have one's friends have it and people one knows have it than people one does

not know; and there has to be an outside force which requires people to do right and do good, and do it right now.

I was particularly interested in Dr. Willie's suggestion of the consideration of some kind of carrot to achieve a fast affirmative action program, particularly with respect to blacks. I would like to throw in here, the absence of blacks is no accident. Most of my friends at Harvard, Yale, and Columbia act as though somehow God did bad things to them and they woke up one morning and there were the blacks.

When Abe Harris was at Columbia, he was available as a potential faculty member as a student of Wesley Mitchell, but he was not brought there. Alain Loche was a Rhodes scholar. I can go down the list of people who, 30 or 50 years ago, met all the standards of white academia and weren't brought in as members of faculty because of white racism in academia; so, it is not something that happened accidentally and necessarily to academic life.

But back to the carrot notion. I was reminded when I read Dr. Willie's paper of a conversation that I had with the Prime Minister of Sweden last year, in which he stated how proud he was of his ability to persuade industries in Sweden to use women in positions about which they had been very nervous. What he did was promise them some help from the Government and some extra money if they did it. He said it is amazing how fast the industries moved in this direction.

It might be useful to take a look at whether or not this in fact has happened there; and whether, again, the Swedish experience might be a useful one for us to emulate here. But certainly there is no—I have come to the conclusion in this and other areas—there is no substitute for outside influence.

In addition, it has to be continuing. My experience as a director of the university board, which I mentioned to you, and in other places convinces me that even the strongminded and the hardheaded and the tough, epithet and accolades which I will be willing to accept for myself, are not enough. There must be blacks and women who are in many places where they are able to point out both personal and institutional racism to those who are in positions to enforce this racism. I think this is another important aspect of the paper that Dr. Willie has presented here. The notion that it is enough to put one black or one woman there, and to assume that this person is perfection and Athena as well as Zeus in wisdom and power, to prevent the excesses of racism, I think, is too much.

So, there must be both continuing monitoring and widespread employment administration of affirmative action so that we do achieve both a heterosexual society in higher education and a salt and pepper society in higher education.

And I remind you that we are sitting here talking about integration of higher education 21 years, 3 months, and 3 weeks after *Brown* v.

Board of Education. I refuse to go back and look to see how long it has been since *Gaines* v. *Missouri,* which talked about the exclusion of blacks, which is really what we are talking about here.

I find myself asking: How long are we going to be willing to accept the exclusion of black people and to a lesser degree of women? And here Bunny Sandler and I might disagree. Women have always been on faculties in some way, but blacks have been excluded totally; and here, I think, the need for acceptance of competence of blacks, the ability of blacks to be not only president of Michigan State but administrators all the way down the line, tenured faculty members not only in the sociology department but indeed in medieval history; and I have been in a situation where somebody just gave a fellowship to a young black in medieval history and languages; and there are no areas that are not open to blacks and the burden is on those who would exclude blacks to show that they must exclude because there are none, rather than upon those of us who are black, like Mr. Willie, to prove that he is the person.

CHAIRMAN FLEMMING. Thank you very much. At this time, I am very happy to recognize Harold Fleming, president of the Potomac Institute. We are delighted to have your reaction.

RESPONSE OF HAROLD C. FLEMING

MR. FLEMING. Thank you, Mr. Chairman and members of the Commission.

I am very pleased to be in this company, to be able to react to this very impressive paper. I might mention first that my concern and that of my organization for affirmative action goes back to 1961, when President Kennedy issued Executive Order 10925, which established for the first time the principle of affirmative action as official policy.

At that time, we were asked by the Department of Defense to develop recommendations for a comprehensive compliance program for that department and hopefully one that might serve as a model to other Federal departments and agencies in enforcing the terms of that order. We did that, but many of the more far-reaching recommendations we made weren't adopted until years later; and there are still some that aren't in effect, which illustrates the length of time it takes to develop a comprehensive program, even after policy is set. Indeed, it wasn't until the late sixties that the term affirmative action achieved specific and detailed definition.

In 1973, over 10 years later, we took a look at the most recent employment data to determine just how much progress had been made in those intervening years. What we found can be summed up very simply, and it is something you all know. I quote:

> More than a decade of affirmative action policy has yielded woefully inadequate results. Blacks and other minorities are still

drastically underemployed in every category except the most poorly paid and least desirable jobs; and in the highest paid and most prestigious levels they are rare indeed.

This applied to every area of employment that we looked at, including higher education and what was true for minorities was generally true for women as well.

Looking back over this rather short history, as history goes, of affirmative action, the conclusion I draw closely parallels many of those that Dr. Willie has drawn from his extensive personal experience and that Pat Harris also alluded to.

I would like to add very brief comments to a few of them. First, I would agree with Dr. Willie's contention that it is much too early in the game to be making major changes and exemptions in the requirements and procedures that have developed only recently and then only after many vacillations and difficulties in the higher reaches of the Government.

There is a tendency in some quarters to look upon the affirmative action program as a set of bureaucratic requirements arbitrarily and needlessly imposed on well-meaning institutions. This is far from being the case. Each of these requirements is rooted in mountainous evidence that the institutions in question are unwilling or unable to reform themselves without supervision or to respond adequately to more permissive requirements which existed in earlier years.

Numerical goals and timetables, for example, came to be prescribed only reluctantly and after years of demonstrations that simply requiring a passive attitude of nondiscrimination on the part of employers produced few, if any, results. By the same token, a high degree of specificity in employment analysis is the only way affirmative action can become more than a slogan and can be meaningfully monitored. That has been demonstrated over and over. Good intentions alone simply don't produce results, unfortunately. I wish they did.

As Dr. Willie said, it was strongly argued by some that tenured faculty positions are simply not amenable to affirmative action requirements and thus should be exempted from them. We are told that the selection process involved here is simply too highly specialized to permit a judgment by anyone except those directly engaged in that process. This argument flies in the face of everything we have learned about equal opportunity programs over the years. It is no indictment of the morality of professors to suggest that they share our common human frailty in finding it difficult to change old habits and ingrained practices without pressure from, and accountability to, authority outside our own comfortable peer group.

This is true so far as I know of, well, let's say almost everybody in almost all situations. In matters of this kind, as has been pointed out, large institutions don't successfully police themselves.

It has also been argued that academic employment generally is sufficiently different from all other kinds of employment to require a specially-designed and staffed mechanism for its supervision. I am afraid this speaks to the tendency of all of us, again, to view our particular situations as uniquely special. Many businessmen would argue with equal fervor that the selection of senior business executives is too intricate a process to be evaluated correctly by anybody except themselves. Other groups would do the same. But acceptance of this argument on behalf of the university is bound to be viewed by a great many people, whether justifiably or not, as nothing more or less than acceptance of elitism.

A further difficulty is that it is precisely the upper reaches of academia that most need opening up to members of hitherto-excluded groups. As Dr. Willie said, "trickle up" doesn't work any better than, if as well, as "trickle down" when employing institutions are left to their own devices.

Finally, let me say I deplore the spirit of ungenerosity that often seems to animate discussions of this subject and objections to affirmative action. If there is one area in which an extra pressure of vigilance on behalf of equal rights would seem justified, it is with respect to institutions that receive special dispensations in the form of contracts from the national Government. Moreover, we are talking about a program that has been applied in a serious way only for a little more than half a dozen years. Yet, for over 200 years minorities and women have been openly and flagrantly discriminated against. Surely for more favored groups a little more practice and tolerance with respect to these requirements would seem to be in order.

In the current effort to redress the injustices of the past, I have seen no convincing evidence of massive reverse discrimination. It is much talked about, but there is very little evidence. Certainly, the data that have been available to all of us don't seem to bear out any such charges.

I do agree there are potential dangers in an affirmative action program that tries seriously to produce needed basic changes in the society. I agree that the program should be subject to constant review and surveillance and that abuses, when they are found, should be openly and strongly combatted. I also agree that the time will come, though it will take longer than we may wish, when the requirements of affirmative action can properly be relaxed and possibly even abandoned altogether.

We will know when that time is here. It will be when the existence of real equality of opportunity is reasonably evident in results and when women and minorities are reasonably represented among those at the upper levels who determine the character and practices of the institutions.

DISCUSSION

CHAIRMAN FLEMMING. Commissioner Freeman, do you have questions you would like to address to the members of the panel?

COMMISSIONER FREEMAN. Yes, I have a question. I would like the panel to comment, as well as Dr. Willie, on any relationship which they see between veterans' preference and affirmative action and the implications of it.

DR. WILLIE. I am not aware of the veterans' preference issue.

COMMISSIONER FREEMAN. Veterans' preference, whereby any civil service applicant automatically got 5 or 10 points—

DR. WILLIE. I see. I think that is a different order of problem that has to be treated not as an affirmative action matter. Veterans have been awarded a position of preference because of a sacrifice that they made for our country. That is a different order of problem from the one of denying minorities the opportunity of making a sacrifice for the academic community by being a faculty member.

I make that statement deliberately because the major problem with our colleges and universities is a distortion of the concept of quality. When we are calling for minorities to be placed in faculties of higher education on an affirmative action basis, it is not to reward the minorities. It is to enrich the universities. Truth is not a property of any individual. It comes out of the conflict of ideas, and a university that has a homogeneous faculty of like-minded and look-alike people is not likely to be a faculty that finds truth.

Thus, I would say that Harvard or any other school does not find truth if its faculty consists of look-alike and like-minded individuals. So, this is why I said the call for diversity in university faculties is not a call for a reward for women or minorities. It is a call for upgrading the quality of a national resource, which higher education is, and the Federal Government ought to be concerned in the light of the Federal funds that go into this national resource.

COMMISSIONER FREEMAN. Mrs. Harris?

MS. HARRIS. I would like to come at this from another point of view. The veterans' preference represents a policy judgment by the Federal Government and frequently by other governments that people with a particular status, may or may not be somebody who has been in combat, may or may not be somebody with a purple heart, but it is somebody with a particular, recognized status, who shall have an advantage which recognizes that particular status.

None of the people that I have heard scream in agony about the short-run preference that some of us feel that blacks, equally qualified to whites, ought to get in employment by reason of previous exclusion—none of those people have argued that veterans' preference ought to go. I think we ought to make a policy judgment which is identical to, or similar to, the veterans' preference policy judgment that says those who are not now present in given positions because of an

antecedent condition of discrimination will, in addition to whatever the objective determinates of relative quality may be, have a preference—a preference designation of 10 points. Now, if the person scores 60 on the test, they only get up to 70, and they are still not ahead of the person who scores 90. And those who are qualification prone don't have any problem.

It is a policy judgment that does not deal with sacrifice, though I could make the counter-argument. I am not as liberated as Dr. Willie on this subject, but it is not a sacrifice question. It is a policy judgment. If I remember my history correctly, one of the original justifications was that the veteran had been out of competition for the period he was in the armed services, and the fact that he had been out of competition would not be something that could be used against him.

I submit that black people and women weren't out of competition for 5 or 10 years. They have been—we have been out of competition, because I am in both groups—we have been out of competition for 300 years, and the 10 point veterans' preference, veteran black and veteran female, I would be all in favor of.

CHAIRMAN FLEMMING. Do you want to comment on that, Mr. Fleming?

MR. FLEMING. Just a word to say I think it is useful to look at that experience and I agree with Mrs. Harris that it illustrates that that kind of policy judgment is not unprecedented in this society.

I myself am a little leery of freezing into civil service so quantified a system as that, which might become inappropriate and linger on, whatever groups we are talking about. That is my reservation.

VICE CHAIRMAN HORN. I would like to ask the reaction of each of the members of the panel to this question. Before I ask the question, I would like to lay down some background.

As you know, there is a growing trend among the colleges and universities of the U.S. toward collective bargaining, and one of the philosophical suppositions behind collective bargaining on some campuses is that promotions, sometimes even appointments but promotions in particular, should be made on the basis of seniority and not merit.

As you are well aware, when we look at the industrial sector, we often find that affirmative action pressures which have provided opportunities for women and minorities in perhaps the last 5 to 10 years are slowly coming into conflict with seniority provisions in collective bargaining contracts; and in the industrial sector, we recently saw where whole shifts have been laid off that were composed exclusively of women and minorities because they were hired in the last 1, 2, 3, perhaps 5 years, while those that didn't reflect that cross section of the society continued on because they have seniority.

What I would like is your reaction and opinion as to what is the relationship between effective affirmative action programs and the

growing trend toward collective bargaining in American universities and colleges. What do you see as the intended and unintended consequences of that trend?

DR. WILLIE. I wish to say first that I think it is important to recognize the nature of scholarship and of a faculty and to realize that qualifications of faculty members are different from the qualifications of industrial workers.

For example, white social scientists have a tendency to study the black family from the point of view of weaknesses of the black family. Black social scientists tend to study the black family in terms of the strengths of the black family.

An adequate sociology of the black family ought to consist of studies of weaknesses and strengths, and it is because our universities have not had the kinds of people in them who ought to be there—black as well as white social scientists—that we have not had a full range of studies on the black family. That is the point I constantly emphasize—that affirmative action is concerned with enriching the faculty. Whether or not this is the goal of collective bargaining, I cannot say. But I do know that a diversified faculty is stronger than a homogeneous faculty. Faculty diversity is one goal of affirmative action.

We can't look upon qualifications as being simply a phenomenon of academic degrees or experience. From the scholarly perspective, qualifications involve one's existential history. A university is a place for seeking truth. Truth comes only where there is a clash of ideas. Thus, persons of different existential histories ought to be on university faculties.

So, the call for diversified faculty is a call for increasing the opportunity for a clash of ideas so that the truth might emerge. I have to underscore the fact discussed above because I think this has been the misunderstanding quite often.

Now, as we move over to discuss the whole issue of industrial unionization and so on, my general feeling is that there is no reason whatsoever why that ought to have an impact upon affirmative action in higher education. What we are talking about here is the selecting of individuals from outside to bring to the faculty an experience that is not there.

The senior faculty should be diversified by people who have had the experience of being a minority. Being a minority is a valuable experience. I often have told whites that it has been so beneficial (being a minority) that I hope they would have an opportunity to learn some of the things I have learned.

As a matter of fact, I was a court-appointed master in the Boston school desegregation case, proposing a plan for public school desegregation. I persuaded the other masters to recommend some school district that would have a majority of blacks so that whites might have the beneficial experience of being a minority.

If a faculty, then, does not have persons who have had the minority experience (which is important in the development of knowledge), then one is not violating union rules by bringing into a faculty a quality that whites, who are members of the majority, cannot fulfill anyway.

VICE CHAIRMAN HORN. If I might interrupt, I agree completely with your premise. The only problem is you have a declining enrollment in American colleges and universities. Some of them are closing out departments or releasing faculty.

Under both civil service provisions for public universities as well as some of the collective bargaining contracts, the one last hired is first fired. In that sense you have an analogy with the industrial sector.

Even though I agree with your premise, there ought to be different criteria for appointment in a university than within the industrial sector; although at the executive levels and others, one could make that same argument in terms of perspective and experience.

But I wonder if you would like to react to that, as to what the economics are that force these things.

DR. WILLIE. That may be true, but I don't think we are at the point in most universities where faculty members in large numbers are being discharged.

VICE CHAIRMAN HORN. Mrs. Harris?

MS. HARRIS. That is an extraordinarily difficult question, as you knew when you asked it, because the presence of trade unions in higher education in significant ways is a fairly recent phenomenon. It is a recent phenomenon in an institution in which it is very hard to identify who the bosses are.

I started my career in workers' education, and we could always sing great songs about the bosses, but in administration it is difficult.

You have the tenured faculty members. I am 6 years away from academic life, but I recall that the trade union movement tends to get its impetus from an impersonal administration, in either 100 institutions or community colleges in which faculty members are eligible.

But I want to suggest the important thing for this Commission is that you have a chance to make a difference before trade unions become the general way of organizing the life of the campus. There is still time for blacks to get in.

Now, the whole question of seniority is the subject of another discussion. I happen to believe that where women and minorities are concerned, there has to be a change in seniority for the same reasons I suggested in my first comment—that women and blacks were kept out by the very people who would now benefit from having kept them out.

That may be, if you haven't already had it, the subject of another symposium for this group, but I don't think at this moment that is a major issue.

We have got a chance to get blacks in at a time when they are able to achieve seniority, and Dr. Willie said, appropriately, blacks ought to be

brought in at the top—that is the one place where most faculties agree today they really don't want to bring any black people in.

An untried instructor is fine because you can fire him in 2 years if he is black. To bring him in as a senior professor with tenure when he comes, that is a "no-no." That is what we have to deal with.

VICE CHAIRMAN HORN. Mr. Fleming?

MR. FLEMING. I think it would be a disaster if seniority became the sole criterion for promotion, retention, or layoff of faculty people at colleges and universities.

VICE CHAIRMAN HORN. Very good. I completely agree with you.

Number two, I don't know if you were furnished this paper that we were by Professor Thomas Sowell—have you seen that at all? It will come up later. It is on affirmative action reconsidered.

In that, he cites a book by Kent G. Mommsen—actually, an article—called "Black Ph.D's in the Academic Market Place," which appeared in the *Journal of Higher Education,* April 1971.

This statement is made: "One of the problems is that black academics eager to leave and join white faculties are few and far between. The survey has shown that the average salary increase required to maintain black academics willing to move was over $6,000 a year."

Does that conform to your own experience in dealing with black academics? Do you see that as a problem? What are some of the other problems besides the individual discrimination? I am talking now about group characteristics. Source of supply.

DR. WILLIE. Fortunately, I read that paper when I arrived just before this session began. While I didn't check out all the footnotes, I checked that one out because it becan to resonate wrongly with me.

It feeds into the old stereotype that black academics are now being paid better than anyone else. That is why I gave my personal experience at the university where I was a candidate for a tenured position; I not only was not offered a salary more than anybody else, I was rejected.

I also can report here that I am not the highest-paid professor in the school of education at Harvard. Another response is this: You may note in a table in the Sowell paper that the numbers of blacks involved (in the tables using data of the American Council on Education) are very few, and I would say that looking at the salaries that the few blacks who have achieved earn, and questioning whether or not such salaries are merited, is to suggest that blacks really are not as capable or better prepared than whites in some instances.

I would expect (and I expect this because of another experience) that the few blacks who have achieved are more capable than many whites in an occupational role and, therefore, should be paid more. I have been deeply involved in the Episcopal Church in the issue of women becoming priests, and I can make a judgment that the few women

priests now are much more highly qualified as a group than the many men priests.

What am I suggesting? When there are just a few who are beginning to come forth in an occupational role, obviously they probably are even better qualified and, therefore, should be paid more. So, it is not unlikely that the few blacks who have come to the top may be more qualified than the many whites who are there. Thus, one should expect their average salary to be higher than whites at this point in time.

But if you take a social Darwinian view, any black is always less qualified than any white; such a view often is the basis for questioning whether or not the black merits the salary he or she receives.

VICE CHAIRMAN HORN. Thank you. Let me ask one last question. Some have argued to secure proper representation for minorities and women in universities and higher education generally is not simply a problem of discrimination but also one of supply. In particular, the data presumably so well quoted shows that blacks just as women—and I would agree that could be from elementary prekindergarten training up—have inclinations to go into certain disciplines more than into other disciplines. What is your reaction to that type of statement?

MS. HARRIS. I would just point to the experience of a prospective dean at a midwestern college, a woman who is black, known to all of us. A woman in the sciences who somehow just didn't measure up for a tenured role, tenured position on that major faculty.

I think Dr. Willie is right. Instead of talking about generalities, we ought to look at specifics, at persons who are in fact available in these short-supply fields and see what happens to them when they present themselves for selection. They are almost always turned down in ways their white male peers with the same qualifications, the same status, would not be turned down.

Now, there is an assumption—and Dr. Willie knows it as well as I do—and that is the reason he had those little personal experiences, "I wish I were black." The assumption that none of us as blacks can possibly be better than anybody who is white and probably not as good as anybody who is white.

I will tell one of my experiences in which a classmate of mine who finished eighth in a class in which I was first—a white woman said when I was selected for something, that she would have been happy to have been black in order to get some place.

And I said, "In order to get somewhere in this world, you just have to be smarter than you are, and that is what bothers you."

This, I think, is something that most white people try to avoid looking at when in competition with blacks. Now, gentlemen, well, Plummer Cobb is a woman in the sciences, who for some reason could not—if I can believe the *Chronicle of Higher Education* —was not acceptable for tenure on a science faculty at the University of Michigan. I know the kind of person she is because we went to high

school at the same time, so I know she is as middle class and upper middle class as anybody, including most of her would-be peers.

So, I would say that the test of the suggested ruling is the Plummers and the Willies, and it suggests that the rule just doesn't exist.

DR. WILLIE. Could I make, also, a specific comment? In my paper I indicated that sociology departments all over the country in 3 years had said they could find minorities and women more frequently than they could find them in the past. So, there is one profession apparently that is beginning to find more people.

I also indicated that one of the most difficult times I had as a member of the affirmative action committee at Syracuse University was with the religion department. I really can't understand why a religion department can't find blacks who know something about religion. Yet, we had difficulty there.

So, I think the whole idea of saying one can't find women or minority persons is really in some respects not factual. It may be true, however, that minorities have not trained for some fields which they thought they could not get into. There is a very interesting article by Dr. Austin which looks at the career plans for high school senior minority students. It reveals some interesting changes. Between 1965 and 1970—this is during the age of affirmative action—the proportion of minority high school students who wanted to go into higher education changed from 1 percent to 10 percent. Why? They now know there is a possibility of getting a job.

Also, Dr. Austin has a book about the academic women, which points out that in most instances women now have equal opportunity to get scholarships and that they are admitted equally to some of the good graduate schools, but that they are unequally hired after they graduate.

So, there are examples that minorities can be found. There are examples of women being trained, and there are examples of well-trained women not being hired.

I think that the test is whether or not colleges and universities are required to go out and find women and minorities; they can if required to do so. I found two black professors other than myself when I was chairman of sociology in Syracuse. James Blackwell at the University of Massachusetts in Boston has two black professors other than himself. Both of us know we didn't have to pay the highest price in the country to get them.

VICE CHAIRMAN HORN. Mr. Fleming?

MR. FLEMING. I agree with what my colleagues have said, although I think there is a need for attention to supply pools. I think the point they are making, which I strongly agree with, is that this should not enable people to cop out on performance or to substitute supply for demand.

One of the troublesome things about Lester's recommendations is that while he wants to exempt tenured faculty, he says this will be taken

care of by gradually beefing up the supply as though this would automatically produce results on the main level.

The law of supply and demand has been repealed in some quarters.

VICE CHAIRMAN HORN. Thank you. Commissioner Ruiz?

COMMISSIONER RUIZ. I have a premonition already that we will hear a great deal relative to qualifications in these hearings, and what particularly interested me were the observations made upon the subject of administration and management, which Dr. Willie identified as one area where a link of truth could exist.

Dr. Willie observed that evolutionary or developing process of affirmative action is a copout. I am not too sure whether Patricia Harris agreed with him. But, nevertheless, she believed that some outside force is necessary to impel affirmative action.

To what extent are any universities establishing chairs or special courses funded to study the training of lower management or junior untenured educators for management and administration in higher education? Now, I will put this question to Patricia Harris because she is squirming in her seat and wants to answer it.

Ms. HARRIS. I am an ex-associate dean of students, and I will tell you that the most untrained people in this world are university and college administrators.

The question of the training in administration is one that I gather is agitating the academic community generally. Now, I gather that institutions like the American Council on Education are consistently doing a job of looking at the question generally of training administrators without regard to race.

I think that the job with blacks is not the range of minority administrators but the selection of black persons to join that pool of essentially untrained academic administrators to get training along with their white peers. This is a problem that unless something has changed tremendously in the last 6 years affects both whites and blacks, and the initial problem is getting blacks into that pool.

You chose a professor of English to become your next chairman, associate dean, and he never knew where to find the chalkboard.

COMMISSIONER RUIZ. The reason I asked the question is because I am not an educator, but I have noticed in speaking with educators that they have a great deal of confidence in status, in qualifications, things like that in their particular field and spheres.

Now, let us assume that there is a "buddy system" or an "old boy" system which rejects upward mobility, and these barriers are difficult to break, even with respect to those in administration that are bad administrators; and if they have courses, nevertheless, wherein minorities could participate where they would get some sort of indicia and say, "Here is an additional qualification that these people have"—would that be of any help or do you actually believe that it won't be of any help?

Ms. HARRIS. I think it would help, but unless things again have changed in 6 years, faculty members don't have much respect for administrators anyway, so that is not something that will give black people any extra respect as black people.

Now, I think it helps to have people who come out of any program which is credentialed, and it is especially helpful to black people to be credentialled. I think at the lower levels of administration across the country, black people would be chosen simply to improve the statistics. But, if I am right, administrators continue to be chosen from the faculty on which they are, and the important thing is to secure black people who have that kind of status that can convert them from faculty members into McGeorge Bundys. That is what we are talking about.

COMMISSIONER RUIZ. I will get back to my original question. Do you know of any course that is funded for purposes of special training for management in higher education? This is the original question.

Ms. HARRIS. I mentioned one. ACE. That one I did mention. American Council on Education, I know, has such a program.

VICE CHAIRMAN HORN. Could I serve as *amicus curiae?*

There are a number of courses in higher education. There are a number of institutions. Stanford and Columbia have programs in higher education administration with the granting of a Ph.D., and I know that minority members, both women and minorities, have graduated from these programs and are now in positions of administration and middle and top management in higher education. In addition, universities, including my own, conduct special middle-management courses for people already on board, particularly women and minorities at the lower management levels, to upgrade them in the administrative and staff chain within the university.

As Mrs. Harris says, one of the great difficulties is when the faculty selects through recommending committees for school appointments or university appointments. They generally tend to look at one of their peers who is a full professor, perhaps in medieval English, and put him or her in charge of fiscal affairs. This is one of the crimes occurring in American universities, when you have competent administrators—many minorities and women who could do the job quite well but don't have the Ph.D. credentials.

DR. WILLIE. I wanted to make a couple of statements. You are right that there will be a great deal of discussion about qualifications.

One of the points that I often make is that all we are asking with reference to minorities and women is that universities hire them both as faculty and as administrators who have the range of competence of the present members of the administration and faculty. If this is done, I am sure that many will get in. This very important point puts to rest the issue of qualifications. Use the present range of competence within the faculty and administration. I guarantee that women and minorities can be found who are qualified if the present range of talent is used,

including the bottom as well as the top of the range. We must cease requiring that women and minorities be super. Not all white males are super.

Many of these universities and colleges could benefit from having minority faculty members who do not need additional training. Someone has said that if you really want to find a college administrator who knows how to squeeze every penny out of a dollar, consult a black college president.

I am instituting a program at Harvard next year, a special program, which will bring to that campus some of the best educators who have taught in black colleges, so they can tell how they have been teaching for years.

Schools like City University of New York are agonizing over open admissions programs when, if they would get on their knees and go the black colleges and say, "How have you done it for 100 years?" they might learn how to teach any and all students who want a college education very well.

The point I am making is that the qualifications are already there. We have to stop looking for superblacks and superwomen because we don't have super-white-male adults. Colleges and universities need women and minorities as they are and not as faculty or administrators made over in the image of white males.

COMMISSIONER SALTZMAN. In line with that point, I think Mrs. Harris made the point that there has to be short-run preference treatment. I assume that you are not dealing with qualifications. Then, what specifically are you referring to when you speak of short-run preference treatment?

Ms. HARRIS. I think I would accept what Dr. Willie just said, that there are in fact people with both the paper credentials and the experience to do tasks that need to be done who are not considered by the white faculties because they didn't go the classic route. They are not Haverford A.B., Harvard M.A. and Ph.D. It is not just the credentials. It is the source of the credentials. It is not just the experience. It is the nature of the experience.

It is always interesting to me that people who are committed suddenly find there is somebody down in Shaw University who has been teaching a field and who perhaps has a degree like an M.A., and there are people with qualifications.

It is a copout and, more frequently, it is simply a lie that the blacks are not available with the qualifications. They are just not Harvard qualifications. There is a terrible snobbery in white academia, a snobbery that does not accept certain kinds of credentials as valued.

I mentioned McGeorge Bundy, who, I think, does not have a Ph.D., and I point to David Reisman, who does not have a Ph.D.

VICE CHAIRMAN HORN. Arthur Schlessinger is another one.

COMMISSIONER SALTZMAN. I don't either.

[Laughter.]

Ms. HARRIS. My point is that even the Ph.D. credentials, in the presence of demonstrated competence and ability or the right kinds of connections, will be accepted if the applicant is white and the qualifications are not Ph.D. qualifications even for white people. So, I am saying the qualifications exist.

The preference I am talking about is if you have—I am so far away from academic life—let's suppose you have a student of the teacher in medieval English applying for a position and a good disciple of another man applying at the same time, and the good person is black. Obviously, if all things were equal, I would take the guy who comes from the best teacher; but in that case give preference to the black because he is a good person and qualified and can do the job. The other guy will get a job.

That is the kind of preference I am talking about. You take somebody who has the qualifications even though he may not be the ideal at that moment, given our ability to idealize certain qualifications. That is what I mean by preference.

COMMISSIONER SALTZMAN. May I pursue that? Are you saying that timetables and goals do have an implication of preference, of some preference, or ought to have an implication of some preferential treatment? Proponents of affirmative action have said that there is no preferential treatment involved. This is the first time I heard a strong proponent of affirmative action say, yes, there is a desirable element of preferential treatment in affirmative action.

Ms. HARRIS. All right. So that I am not misunderstood, if I put it the way I do in arguments to friends who are opposed to affirmative action, I would establish a baseline of competence.

Using a numerical baseline, let's say 80 percent performance is the baseline. Anybody who measures at some kind of 80 percent can perform the task. We can assume that somebody who is at a 90 percent baseline would perform better. Somebody who is at 100 would perform perfectly. The 80 percent person is black. The 90 and the 100 percent people are white. In all instances in which I am employing in a situation in which there are no black people, I would choose the 80 percent.

Now, what is crucial there for me is the baseline of performance. The person must be able to perform safely. So, there is in that an element of preference. All are qualified. All three would be qualified. Some just might be a little bit—the reality is that there is no baseline that can be assured that the 80 percent person will not perform as well or better than the 100 percent.

COMMISSIONER SALTZMAN. Is this a condition for specified length of time or a limited situation that you are advocating?

Ms. HARRIS. I am a terrible egalitarian, and I am a terrible elitist. It is hard to combine the two. I would hope it would be for a limited period of time, but I think it was Harold Fleming who said that the

determination of when one ends the preference is a determination made on the basis of results.

One does not require a result at any specific time, but one does not end the preferences until a result, which is roughly related to those previously excluded in the target population, which is reasonably related to the gross population that is relevant. Now, in some cases, it may be the academic population of blacks. It may or may not be the general universe, but it is the result. Whether we finally have pepper and salt and women and men in the academic population

COMMISSIONER SALTZMAN. One final point. Dr. Willie—in terms of the time, you are saying there ought not to be a specific pattern or time while that might make the goal or quota. Dr. Willie was suggesting there might be more specific time than the Carnegie recommendation of 5 to 10 years.

MS. HARRIS. Let me say I think one can have short-range goals. The 5-year plans are not absolute because they get changed every other year, but one can have a point at which one reassesses the success; so I think it is a mistake to have any goals and timetables that are openended. They should have a terminal point for the purpose of evaluating their success.

CHAIRMAN FLEMMING. I might say on that particular point that I am not very encouraged with plans that indicate they are going to achieve a particular goal in 30 years, as one of the plans we know about.

I have listened to the presentations and the dialogue with a great deal of interest. As I listened to the members of the panel, I feel that they have underlined what I consider to be the basic principles for affirmative action.

I would like to say this: As I read the general accounting of his report, and then as I read certain portions of the Carnegie report, to which I referred at the beginning, I felt very sad in terms of the fact that the institution of higher education, which has been a leader in so many walks of life, has for a variety of reasons up to the present time decided not to be a leader in applying the basic principles that we have in mind when we talk about affirmative action.

As I listened to all three of you, I gathered you believe that, growing out of your own experiences and observations, the basic principles underlying the concept of affirmative action should be applied and applied vigorously to the field of higher education. Do you feel that unless that happens, the field of higher education will find it more difficult to provide leadership in other areas?

DR. WILLIE. Yes. I would like to answer affirmatively to that question because I have often said that one of the problems higher education is experiencing today is it is answering questions that no one ever asked, and one reason why it is answering questions no one ever asked is because it doesn't have all of the people in higher education who could pose the right questions. So I think it is very important for

this Commission to recognize that when we speak of the need for diversity, we are speaking of that need as a way of enriching higher education. In the past in terms of the kinds of people who participated in it is inadequate for the range of problems that we experience today and that we will experience in the future.

MS. HARRIS. We can't allow the university to be a privileged sanctuary in this area. We can't allow that for the sake of the entire country. There is much academia has to say to the rest of us, and the academic community will lose credibility if the requirements of affirmative action apply to all sectors—save that which would discuss with us the directions in which we need to go—out of their experience and academics.

In order to protect them from themselves and protect them for ourselves as a national resource, we have to deprive them of their wish to be a sanctuary. They have to struggle with this in order to tell south Boston or anybody else how to deal with the problem.

VICE CHAIRMAN HORN. Ms. Harris, you mentioned in that example that you would establish a baseline and that, if a person was qualified, then given the circumstances of underutilization, whether that person should be appointed—that is very interesting and I don't disagree with that, but the argument often goes further by some on either side of the affirmative action question that we are not simply talking about a *qualified* person. We are talking about a *qualifiable* person. While that isn't the way I understand the regulation, some would argue, for example, that if you have underutilization of women and minorities, perhaps you should let an M.A. candidate in even though the whole department has always required historically Ph.D.s. How do you react to that?

MS. HARRIS. I thought I had reacted, pointing to my friend, Arthur Schlessinger, and others.

VICE CHAIRMAN HORN. They don't have the Ph.D., but they have the publication output. Schlessinger was a member of the society of fellows at Harvard. That is when he wrote *The Age of Jackson.* He had the equivalent of a Ph.D. by any test, even without a doctorate.

MS. HARRIS. If we can free black people to do some research and keep some of us from spending our afternoons trying to find ways to get some of us where we haven't been, maybe we, too, will be able to do research.

Again, it depends on what it is. If you have a student of foreign literature, my point is obvious. Also, I am deeply concerned about what I confess is my semiparanoia: I believe it to be a kind of self-fulfilling prophecy—bringing in people who are unable to do the task tends to confirm in the naive observer's mind the notion that people in that group are incompetent; and therefore, it seems to me that if we are not to build up continuing resistance, that we have to have some notions of baseline qualifications.

Now, when you say "qualifiable," a Ph.D. candidate is competent to teach everybody except candidates for the Ph.D. and may be able to teach candidates for Ph.D.s in some instances. Those who have not yet completed the dissertation, for example, or those who are Arthur Schlessingers in the process of completing the galleys on *Age of Jackson* are just as competent as Ph.D.s.

So again, I am nervous about what people mean by "qualifiable." The example you gave may or may not be one in which qualifiable is the difference. There has to be a baseline ability to perform the task at hand.

Now, whether or not there is a developmental process which takes the person from the initial task to more complicated tasks in the future—which is what I would call the qualifiable—is another question. You may start somebody teaching undergrads and expect them to be qualified to take on the Ph.D. interrogation 5 years later.

VICE CHAIRMAN HORN. This, in a way, shows my own bias in this area; but wouldn't you say, in summing up, that affirmative action simply requires an explicit search process that reflects good personnel practice, which the department seeking quality candidates really ought to have been carrying out to begin with?

DR. WILLIE. No, I think affirmative action requires a redefinition of "quality." We can't accept the idea that "quality" is simply getting a graduate degree from Harvard, Yale, or Princeton.

I have been involved in the issue of affirmative action with the Social Science Research Council, which is an elitist social science organization. It did not have a single minority person on its staff before September of 1975. I finally pressed the issue so that it now will have minority representation on the staff. The issue was pressed vigorously, largely because the SSRC appointed to its board of directors a person who had a Ph.D. from Syracuse University.

Most persons on the board before my arrival there had Ph.D.s from Harvard, Yale, Berkeley, and other famous graduate universities. I know, as Patricia Harris has stated, that the quality needed in higher education can't be limited to those who have had educational experiences at these universities only.

I have often said that it doesn't do us any good to give a person a Ph.D. and that person hasn't had any experience with the kind of people who riot. We have to broaden the range of what constitutes qualifications.

Now, I also agree that we don't need anyone in higher education who can't educate other people. We are not asking for token individuals.

I would suggest that the range of experiences that ought to be a part of higher education today is not these. What we have been marketing as higher education is too narrow.

VICE CHAIRMAN HORN. I am just trying to find the statement. I can't put my hand on it now. As I recall Professor Sowell's paper, most of the black Ph.D.s in America did graduate from the major Ph.D.-granting institutions; so in that sense, they certainly started the race equally.

DR. WILLIE. No, most of them didn't.

VICE CHAIRMAN HORN. I will find the reference.

DR. WILLIE. I think you should question him strongly on that. Most who may have visibility may have graduated from the major degree-granting institutions, but there are a number of excellent black scholars without visibility that have not even been considered.

My personal experience again is beneficial. I understand that the school of education at Harvard had been carrying on a search for 5 years for a professor of urban education. I am doing today things quite similar to what I was doing 5 years ago. In fact, my qualifications were sufficient to come and testify before your Commission in 1966, when you had a hearing in Rochester, New York, on public school desegregation. And yet the Harvard School of Education did not stumble upon me as several years went by simply because I was out in the country in Syracuse; apparently it was looking for persons who had higher visibility. This, too, is the problem with the search undertaken by many colleges and universities who claim that they cannot find minorities.

CHAIRMAN FLEMMING. Okay. May I express to all who have participated in this panel our deep appreciation. It has been very helpful and very informative.

As I indicated at the beginning, as a Commission we intend to come to grips with the basic issues that are involved here and come out with our own findings and recommendations. You have been a great help to us.

Second Session: Federal Regulations and Case Law

CHAIRMAN FLEMMING. All right, I am going to ask that the hearing resume. As noted on the program, the next panel is going to deal with Federal regulations and case law. The presentation was scheduled to be made by Mr. James D. Henry, Associate Solicitor of the Department of Labor. Mr. Henry, however, is ill and he has asked Mr. George Travers, who is the Associate Director of the Office of Federal Contract Compliance, to present his paper.

After the presentation of the paper that was prepared by Mr. Henry, the presentation to be made by Mr. Travers, we will have reactions from Mr. Howard Glickstein, who for a number of years has been serving as director of the Notre Dame Center for Civil Rights and

who, for a period of time, had a very distinguished career with the Civil Rights Commission as Staff Director and who, beginning in January, will be a visiting professor at the Howard University School of Law.

The other reactor will be Mr. Howard Sherain, who is assistant professor of political science at the California State University at Long Beach.

Mr. Travers, we would be very happy to recognize you for the presentation of Mr. Henry's paper.

MR. TRAVERS. Thank you very much.

STATEMENT OF JAMES D. HENRY

Mr. Chairman and members of the Commission: I appreciate this opportunity to discuss the Executive order program with you and to present some of the problems of application we have encountered with institutions of higher education.

I would like first to briefly review the background and purpose of the Executive order itself and some of the major regulations.

Executive Order 11246 [3 C.F.R. 339 (1964–65 Compilation, 42 U.S.C. §2000e (1970)] as amended by Executive Order 11375 [3 C.F.R. 684 (1966–70 Compilation), 42 U.S.C. §2000e (1970)] provides that those entering into contracts with the Federal Government or performing work on federally-assisted construction contracts agree by contract stipulation that they will not discriminate against an employee or applicant for employment with respect to such factors as race, color, religion, sex, or national origin. The Executive order also requires that as a condition of doing business with the Government, contractors, subcontractors, and those performing work on federally-assisted construction contracts will take "affirmative action" to ensure that applicants are employed and that employees are treated during employment, without regard to race, color, religion, sex, or national origin. Thus, the affirmative action concept requires that an employer seeking to do business with the Federal Government do more than refrain from discriminatory practices and policies, and go beyond the maintenance of policies of passive nondiscrimination by taking positive, result-oriented steps to recruit, hire, train, and promote minorities and women. An employer is judged by the actions he follows to increase the minority participation in his work force at all levels of responsibility and pay. A contractor who makes a good-faith effort to comply will not be found in violation of the Executive order, even though he may be unable to meet his goals of minority and female manpower utilization.

The Executive order is enforced initially by compliance agencies, to which the Director of OFCC has assigned specified industries on the basis of the Standard Industrial Code. These agencies conduct preaward reviews of contrators on contracts for $1 million or more, as

well as regular compliance reviews on contracts of $50,000 or more. Compliance agencies may initiate necessary enforcement efforts and provide interpretations of Executive order requirements. While OFCC has authority to assume responsibility for any matter pending before an agency, such involvement is normally limited to only the most important cases. Thus, contractors and subcontractors are more likely to deal with officials of the compliance agencies than with OFCC personnel. The Department of Health, Education, and Welfare has been assigned responsibility for institutions of higher education.

Sanctions available for noncompliance with the requirements of the Executive order and its implementing procedures and regulations include cancellation, termination (and as a temporary measure, the suspension of contracts), and the debarment of contractors from receiving any additional Federal contracts or subcontracts or federally-assisted construction contracts or subcontracts.

OFCC estimates that approximately 500,000 new opportunities per year for hiring and promotion have been provided for minorities in the supply and service industries as contractors strive to comply with revised OFCC Order No. 4 (41 C.F.R. §60–2), which establishes criteria and mechanisms by which each prime nonconstruction contractor or subcontractor with 50 or more employees and a contract of $50,000 or more may meet its affirmative action obligations under E.O. 11246, as amended. As part of its required written affirmative action plan for each of its establishments, the contractor or subcontractor is directed to conduct "a work force analysis" and a utilization analysis of all major job titles and job groups, with explanations if minorities or women are currently being underutilized in any one or more job groups. The terms "job title" and "job group" replace the formerly-used term "job classification" in Order No. 4 because they more accurately describe the subject matter of a correct work force analysis and utilization analysis.

The contractor's "work force analysis" is a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group), ranked from the lowest paid to the highest paid within each department or other similar organizational unit, including departmental or unit supervision. If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit or line, including unit supervisors. For lines of progression, there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Additionally, if there are no formal progression lines or usual promotion sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of male and female incumbents and the total number of male and female minority group incumbents (blacks, Spanish-surnamed Americans, American Indians, Orientals) must be

given. The wage rate or salary range for each job title should be given. All job titles, including all managerial job titles, must be listed.

A utilization analysis is required for all major job groups in the facility. A job group is one or a group of jobs having similar content, wage rates, or opportunities. There is underutilization of minorities or women if there are fewer numbers employed in a job group than would reasonably be expected by their availability.

These statistics are vital because an adequate compliance review must always be directed at determining the precise areas where minorities and women are working and not working in individual departments or other units and the precise reasons therefor. This is necessary to determine whether minorities or women are being underutilized in certain jobs or job groups, and whether affected-class discrimination problems exist. Based upon this analysis, the contractor's affirmative action plans must contain appropriate goals and timetables to which the contractor's good-faith efforts must be directed to correct existing deficiencies at each of its establishments—thereby materially increasing the utilization of minorities and women at all levels and in all segments of its work force where deficiencies exist.

The remainder of the contractor's affirmative action plan must detail the steps the contractor intends to take in order to make all good-faith efforts to meet its goals and timetables and to remedy all other existing EEO [equal employment opportunity] deficiencies. For example, an acceptable affirmative action plan must include adequate provisions for the outreach and positive recruitment of minorities and women. The plan should contain internal and external procedures by which the contractor's EEO commitment will be made known and fully acted upon. This would include the establishment of formal responsibilities for the implementation of the contractor's affirmative action plan and the provision of internal audit and reporting systems to measure the plan's effectiveness. The plan would include provisions for enlisting the support of minority and female programs and organizations for the purposes of advice, education, technical assistance, and referral of potential employees. Employment practices which perpetuate the effects of past discrimination must be corrected. Employment tests must be validated in accordance with the requirements of the OFCC testing order.

Goals and timetables in faculty and other academic positions, the application of the OFCC testing order to these jobs, and the amount of paperwork required of contractors have been some major areas of confusion and concern. I hope I can explain and clarify OFCC regulations in this regard.

Just as the laws of Newtonian physics do not hold true at very high speeds, the goals-setting principles of Revised Order No. 4 present problem areas when very small numbers are involved. For example, due to a number of factors of which, I am sure, this Commission is fully

aware, the availability of minorities in the professions and most academic disciplines is low—on the order of a few percentage points. Universities tell us that the number of opportunities for academic employment in the next several years in these fields is also very low—for a typical college or university, no more than 2 or 3 each year. Thus, although it is possible to calculate a so-called "ultimate goal"—that is, the percent and number of minority and female employees to be hired to achieve full utilization based on availability—yearly targets work out to small fractions of a person. In those circumstances, some flexibility in setting interim goals would appear appropriate—for example, setting targets by periods longer than 1 year. Revised Order No. 4 provides for taking these factors into account in setting goals and timetables. Sections 60–2.12(a), (e), and (f) provide that:

> (a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good-faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in §60–2.11.
>
> (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good-faith effort to make all aspects of the entire affirmative action program work. . . .
>
> (f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction, and turnover of and in the work force.

Under such an approach, the university would review its projections of opportunities as well as the data on availability of minorities and women each year. If this data yields meaningful numbers, then annual targets should be set. Universities should be aware that they would be subject to comprehensive compliance reviews annually to determine, among other things, if continuing good-faith efforts are being made to meet goals and timetables.

There has been a good deal of confusion recently over the amount of statistical analysis and the sheer volume of paperwork required of universities. Let me try to distinguish the mandatory and the permissive provisions of Revised Order No. 4. Every written affirmative action program must contain a work force analysis, a utilization analysis, and goals and timetable to correct any underutilization of minorities or women.

In addition, the program must explain the contractor's internal organization, lines of responsibility for EEO, the audit and monitoring system, community and organization contacts to be made, and

identification of problem areas to be addressed during the plan year. Now, the last item has probably caused the greatest confusion. It has sometimes been interpreted as requiring every AAP [affirmative action plan] to contain an establishment-wide statistical analysis of such things as hires, promotions, terminations, applicant flow, etc., without regard to the existence of and/or without limitation to identified EEO problems.

Revised Order No. 4 does *not* require these statistical studies in the absence of specific EEO problem areas, nor does it require that the statistical data be part of the AAP. The AAP must identify those problem areas where such a study or studies would be appropriate, and the contractor should undertake those studies immediately. For example, the utilization analysis may reveal that minorities are underutilized in entry-level academic positions. Establishing goals and timetables to remedy that underutilization is just the first step. The cause of the underutilization may be any one of a number of things from inadequate recruitment to selection procedures which screen out a disproportionate number of minorities. Having identified the problem—underutilization—the contractor should proceed to investigate its causes. Such an investigation might involve some statistical analysis geared to the actual problem at hand, but the analysis need not be part of the AAP itself. Of course, the data should be available for onsite review by the compliance agency.

Questions have been raised, both in and out of the Government, whether it is appropriate to apply the OFCC testing order to academic employment by colleges and universities. Selection for academic positions, some claim, is very complex and unique, a process which does not lend itself to the kind of validation studies called for in the testing order.

While it is true that paper and pencil tests are not used in selecting for faculty jobs, selection techniques such as personal history, background, educational and work history may be susceptible to subjective judgments which, consciously or unconsciously, could include an element of discrimination. Selection criteria which are based to a large degree, as these are, on the evaluation of an applicant by previous employers, supervisors, and teachers may also perpetuate prior discriminatory judgments. We are exploring these testing issues, since they pose novel and difficult questions.

Last month, the Department of Labor began factfinding hearings on the Executive order as it applies to colleges and universities. Let me try to outline some of the comments made at the hearings thus far.

Some witnesses have stated that there is simply no need for colleges and universities to establish goals and timetables because minorities and women are already fully represented on faculties in accordance with their availability. To require the detailed statistical analysis of Order

No. 4, they submit, would be wasted effort—the money could be better spent on scholarships for disadvantaged students.

A number of witnesses strongly disagreed with this view and cited statistics which indicate that minorities and women are underutilized in academic jobs. They urged that no substantial changes in the regulations be made now, but called for more vigorous enforcement efforts, better coordination among Federal civil rights agencies, and increased budget and staff for the Executive order program.

Another group of witnesses did not take issue with the concept of goals and timetables as such (although some questioned whether they are applicable at all levels of faculty employment), but they did seriously question the data base used in setting goals.

One general area of agreement among many witnesses was the suggestion that the Government should gather and disseminate the availability data for those positions for which the recruiting area at most institutions is usually nationwide.

We anticipate several more days of testimony when the hearings reconvene beginning September 30. We would welcome any testimony and written statements the Commission wishes to make for inclusion in the hearing record.

MR. TRAVERS. Thank you very much, Mr. Chairman. I will be happy to react to the reactions of the reactors, and of course, I will try to answer any questions you or members of the Commission may have.

CHAIRMAN FLEMMING. Thank you very much. We appreciate your being with us, and we appreciate the helpful paper you have presented.

Mr. Glickstein, would you pick up at this point and react and make any comment of your own? We are glad to have you participating in the program with us.

RESPONSE OF HOWARD GLICKSTEIN

MR. GLICKSTEIN. Mr. Chairman and members of the Commission, I never realized how terrifying it is to be on the opposite side of the table from the U.S. Commission on Civil Rights.

The topic of this panel is Federal regulations and case law. I thought I might randomly comment on some of the things related to this topic. I might also comment on the broader issues before this panel. I think this hearing is being held at a very important time. I believe there is a very concerted effort at this time to retreat on the question of affirmative action, and I think it is very important to review some of the fundamental principles and review some of the reasons such a program was established in the first place.

One of the proposals that has been made by a number of people, including Secretary Weinberger and the Carnegie Council, is that the emphasis today has to be on increasing the pool of eligible and qualified

people for university positions. All the people that are already qualified, so this argument goes, are already employed.

I think it is a desirable thing to place some emphasis on training and increasing the pool. However, I don't think we should be misled to believe that isn't already required. I think the regulations, Order No. 4 and the Executive order and some of the interpretive guidelines that have been issued under that, make clear that it's not enough just to look at the people that already possess the qualifications.

If you define the pool of qualified people as those people that have Ph.D. degrees already, you might say we have already used up all the qualified people; if you use the statistics that the Carnegie Council has used and Caspar Weinberger used, you might be able to show that women with Ph.D.s and minorities with Ph.D.s are already employed. But the regulations that have come out suggest that you have to go beyond that, that you have to consider people that are trainable, people that are in the graduate schools, people that will soon be available. At Berkeley, for example, they have set the goal for 30 years. Hence, it certainly would have been appropriate to consider how many people could have been trained in that period of time, how many people Berkeley could have taken through its graduate school or obtain from other graduate schools.

Again, I think Revised Order 4, section 60-2.11, which talks about utilization analysis, does suggest that you should consider people other than those who already hold the qualifications. The same is true of the HEW guidelines that have been issued to universities. Again, they suggest you should go beyond that. I do agree with the previous panel that we still don't know who is available. I think there is a lot of mythology in the area that suggests we know who is available. To give an example, if you decided that those people who were qualified to teach in law school were those people that are already employed on law school faculties, you greatly limit the pool. Many law schools do that.

In looking for a minority member for its faculty or in looking for a female member, they look to other law school faculties. If instead you also looked to law firms, Government agencies, private practice, you would increase the pool considerably and have additional people to choose from.

In any event, I find it somewhat peculiar to hear universities complain about lack of qualified people. It's one thing for General Electric to say there is a lack of qualified engineers. General Electric is not in the business of qualifying people to be engineers, but it is the universities themselves that provide the credentials for university employment, and they certainly can be expected to do better. I believe that the university's record in the area of affirmative action has been dismal. In this area we should have expected a great deal of enlightened leadership. We should have expected that the vast resources at the

disposal of the university would be utilized to help solve the problem we are discussing here. The university's record I don't think has been as good as business leadership in many areas and even as good as leadership of labor unions in some areas.

Another charge that has been made is that OFCC and HEW regulations really aren't authorized. President Kennedy apparently casually used the words "affirmative action" in 1963. The President didn't contemplate in using those words, as the argument goes, to do what OFCC and HEW currently are trying to do under the guise of affirmative action.

Dr. Todorovich, who will be here tomorrow, has said there has been a *remarkable inflation and transformation of the concept of* affirmative action under the management of nonelected officials.

This is a charge that we are hearing more and more frequently today. In the first place, the Executive order that is in existence today does authorize the Secretary of Labor to issue rules and regulations, as generally is the case with Executive orders issued by the President. Also, in legislation passed by Congress there usually is authorization to promulgate appropriate rules and regulations under them. It's not at all uncommon for those regulations to be voluminous.

Congress can't be expected or the President can't be expected to cover every aspect of the administration of a program that is being instituted. Often the rules are far more extensive than the basic legislation.

If you look at the Hill-Burton Act, Congress passed legislation providing funds for hospital construction. HEW issued regulations that go on for pages and pages and pages, specifying everything, including how toilets are to be constructed.

This is a familiar and traditional way of implementing Executive orders, or laws enacted by Congress. In addition, the rules under the Executive order have not been successfully challenged either in the courts or in Congress.

There was an effort in Congress in the early seventies to curb the Secretary's power to carry out the Philadelphia plan. This plan also sets goals and timetables. The Attorney General had issued an opinion that the Secretary exercised his authority properly, and there was an effort in Congress to curb this, and that was defeated. Congress had an opportunity then to say it disapproved of the goals and timetables concept, disapproved of this procedure. It didn't.

At the time that Title VII of the 1964 Civil Rights Act was amended in 1972, again there were efforts to amend that legislation, efforts to make it clear that courts could not impose goals and timetables; that this wasn't proper. Again, that was defeated by Congress. Congress had a chance again to speak on this and didn't do so. There also is a provision in the 1972 amendment to Title VII recognizing the validity

of affirmative action plans that have been approved by the Office of Contract Compliance.

So Congress has had a chance to consider this issue. Congress obviously knows what is going on, and it has not taken the opportunity to disapprove of the current regulations.

In any event, if the rules are so unfavorable, the simple way to decide whether they are valid is to challenge them in court. Nevertheless, we have not seen any university, as far as I know, making an effort to challenge the legality of these rules. I think the universities perhaps find it easier to put pressure on nonelected bureaucrats than they do to challenge these issues in courts of law.

There is another, more philosophical point that is quite current. I think some people attribute it to Kingman Brewster, the president of Yale. It sounds very profound when Kingman Brewster poses it: the question of whether or not it's proper to use the Government's contracting power to further purposes unrelated to the contract. In other words, if the Government contracts to support radiation research in a university, is it proper to impose conditions that are unrelated to that radiation research?

This is a question that is profoundly troubling many people at universities today. Unless the regulation is directly related to the contract, it is argued that this threatens the sanctity of private universities. I don't think that there is merit to that argument.

First, it suggests that the Government has decided willy-nilly to influence the policies of universities in an arbitrary manner and to interfere in their internal functions and that the universities are sitting there being harassed.

We constantly seem to forget whenever there is a discussion of contract compliance that the universities have taken the first step. They have come to the Government and asked for a contract. They have asked for Federal funds. They would like to conveniently forget that that first step has occurred. They are Government contractors; they are receiving vast amounts of Federal funds. Universities receive billions. Therefore, it is somewhat incongruous for them to object that some restrictions have been imposed on them as a result of receiving these funds. The simple way to prevent this so-called encroachment on freedom, if it is so unpalatable, is to refuse Federal funds and not contract with the Federal Government.

Secondly, the argument that arises about the Government's right to impose affirmative action in a contract situation suggests the only condition the Government imposes when it contracts is affirmative action. You would think the universities are given money to conduct radiation research with no strings attached except affirmative action. This isn't true. There are numerous conditions imposed any time anybody signs a Government contract. Any of you who have seen one know it's a large, thick document with all sorts of conditions,

conditions that require that the contractor adhere to certain provisions of labor law, conditions that require all kinds of obligations on the part of Government contractors that are unrelated to the purpose of the contract.

The McDonnell-Douglas Company was questioned at one Commission hearing about a Government contract for which it had applied. The representatives of that company were asked to what extent did they submit various documents to the Government to justify receiving that contract, and they said it would fill a couple of freight trains. We asked them how much of the material dealt with affirmative action. The answer in that case was none, but the Government contractors are not adverse to doing a lot of paperwork when it comes to questions other than affirmative action.

Finally, it's a common practice to use governmental powers to further social policies that may not be directly related to the power in question.

We are all familiar with the uses of the Internal Revenue Code to further purposes that are not related to the collection of revenue. In fact, to grant a tax exemption to private universities is a recognition of the Government that, although by doing this the Government is going to be deprived of revenue, nevertheless it's desirable to permit private universities to function, so they are granted tax exemptions.

The Government has used the Internal Revenue Code to require gamblers to register and pay a tax. Gamblers challenging this in court have claimed that this is enforcing the criminal law, not the Internal Revenue Code. That argument was defeated. Courts upheld the power of the Government in many instances to use its contracting powers and other powers for purposes not directly related to the immediate purposes of the contract.

Another argument that Government contractors keep making is that they are required to prove their innocence. They analogize this to a criminal case and say that the burden should be on the Government to prove that they are guilty. They shouldn't be burdened with the obligation to prove that they are innocent.

In the first place, this isn't a criminal case. The presumption of innocence only applies in a criminal case. It doesn't apply in civil cases and certainly doesn't apply to Government contracts.

When one applies for a Government job, it's not up to the Government agency to prove that the person is qualified. The person has to demonstrate his or her qualifications.

When one seeks an FCC radio license, the burden is on the person seeking that license to demonstrate the qualifications of eligibility and not on the Government agency to demonstrate it. Similarly, it's up to the Government contractor to demonstrate his eligibility for the contract, and it's not up to the Government to disprove that.

One concept that I hope the Commission analyzes very thoroughly is the concept of peer-group review. In the Commission's recent civil rights enforcement report, there was some effort to deal with this concept. I think it's the concept that the unive.sities put forth the same way newpapers speak about freedom of the press any time you attempt to do something that slightly inconveniences the newspapers.

The universities seem to suggest that this is a very sacred, sacrosanct procedure and right and for the Government to interfere with it will greatly undermine academic freedom. It suggests that there is some great degree of impartiality involved in this.

Mr. Henry in his prepared remarks referred to it as a complex and unique procedure. The interesting thing in listening to complaints of that sort by the universities is that if the Commission were to read some of its old transcripts and listen to the testimony of plumbers, they would find that the plumbers said the same thing about how difficult it was to become a plumber; that members of the Commission couldn't possibly understand the intricacies of the procedure; couldn't possibly understand the differences between residential plumbing and commercial plumbing and all one has to go through to become a plumber.

As a matter of fact, as I recall, it takes longer to become a plumber than a college professor; but, nevertheless, the plumbers made that argument and made it unsuccessfully.

Peer-group review was established for very worthwhile purposes. It was established to protect the freedom of what is taught in the classroom, to prevent the university adminstration or the Government from controlling classroom content by dictating who is in the classroom and what they were teaching. But it is not a principle that can never be violated. Surely, if one department limited its hiring to alcoholics or to redheads, some higher authority would intervene to prevent that. In other words, abuses just would not be tolerated.

What peer-group review has produced in American universities are universities dominated by white males. Allowing this to continue, allowing peer-group review to continue as it is, merely will perpetuate past discrimination.

Dr. Willie spoke about some of his personal experiences. Pat Harris also has been in university administration and has spoken about her experiences. I have also now been in the university world for a little while and have also been a member of the affirmative action committee, and I have seen how difficult it is for white males to evaluate women and minorities. White males find it inherently impossible to believe that a woman or minority can be competent and can be qualified. It's a very, very difficult thing.

I have seen people who appeared to be genuinely sincere struggling with this, and they find it very, very difficult to conceive of women and minorities being qualified. What they do is they look for superwomen or superminorities. That is the only type of women and minorities they

would be satisfied with. On the other hand, if you look at some of the white males hired, their mediocrity would even do Senator Hruska proud. They are often a very, very mediocre group of people.

Anyone who has been on the inside of a university world realizes the sort of abuses that have occurred in the name of peer-group review and the potential for abuse.

We see preferences for graduates of a university. We see preferences given to graduates of certain universities, as Pat Harris was talking about. We see recruiting limited to only certain universities. We see the "old boy" system in operation. We see political maneuvering that would make Mayor Daley envious.

Now the peer-group review also relates to standards of selection. There is generally no opportunity even to be considered without certain basic credentials, most frequently a doctorate degree.

Again, I think this is something that requires a great deal of thought and study to determine whether the types of credentials that are currently being required are actually validated. Mr. Travers referred to the OFCC testing order to validate some of these qualifications, to what extent they should be done in the academic world.

I find myself somewhat suspicious of the new reverence that is given to the Ph.D. degree. It is very analogous to what happened in the South where, after 98 percent of the illiterate whites were registered to vote, suddenly southern voting registrars decided it was time to apply the literacy test. I fully recognize the degree of qualifications and degree of training expected of people today has risen; it is a progressive thing. People are more trained today than they were some years ago. But, nevertheless, I think the sudden reverence given to the Ph.D. is something to be a little bit suspicious of.

I saved this point for next to the last because I didn't want to attack Mr. Traver's employer too early after he finished speaking, but I think the conduct of the regulators of OFCC and HEW has been just shocking. The Commission has very, very beautifully documented that.

I think if the Labor Department had read the recent Commission reports, they would not have instituted their current hearings because they would have recognized where the problem lay. There has been no enforcement of the Executive order. There has been no real attempt to enforce affirmative action in universities.

I think that condition is intolerable, and I hope that some effort is made to require enforcement the same way HEW has been required through litigation to enforce Title VI with respect to school districts.

I would like to just say a last word about what the Civil Rights Commission might do in this area. Certainly, I hope the Commission will testify at the Labor Department hearings. I think the Commission's testimony has come to be very respected and very much depended upon in all areas.

If you read through the committee reports reporting out the recent Voting Rights Act, you will find on every other page there is a reference to something the Civil Rights Commission said. I think the knowledge and the analysis of the Commission is very important in a situation such as this. I also hope the Commission would do some case studies of just what happens and just what is going on it universities. There are too many anecdotes floating around and not enough real hard knowledge of just how hiring and promotion actually operates in the university. We need to explore the extent of discrimination in universities. We need to show what sort of mechanism is employed in hiring and promoting people.

I think some selected representative institutions should be sought out and studied and their past practices should be looked into, as well as what they currently do. That sort of specificity I think would be very valuable. I think the Commission could contribute just as it did in 1957. When the Civil Rights Act of 1957 was before Congress, it was possible for southern Congressmen to allege there was no voting discrimination in the South; but by 1960 after the Civil Rights Commission had done a number of its reports, when Congress again turned to enacting civil rights legislation, that sort of claim could not be made anymore because the extent of discrimination and the mechanisms of discrimination had been demonstrated.

I think we need some more of that in the university world in order to deal with a claim that so many universities make that we don't discriminate.

RESPONSE OF HOWARD SHERAIN

MR. SHERAIN. Mr. Chairman, Commissioners, I would like to share with you my reactions to Mr. Henry's paper. As you'll see as I continue, my reactions form something of a dissenting position to those presentations so far made.

There are some parts of Mr. Henry's paper which I find very useful. His setting forth of the specific requirements—the description of the "work force analysis" requirements, what the "utilization analysis" entails, and his indication of the other elements required in the contractor's affirmative action plan, all this information is helpful and "to the good."

Another part of Mr. Henry's paper I find quite encouraging—not only helpful, but hopeful. When I learned that a representative of the Department of Labor was presenting this paper—a representative from the Department of *Labor* rather than Health, Education, and Welfare—I feared the worst; I knew that the Department of Labor oversees the affirmative action programs of industrial and commercial organizations and that HEW oversees the plans of institutions of higher learning. And I was aware, further, of the tendency not to see any essential difference between the affirmative action criteria to be used in the one

area and in the other. Therefore, I was afraid that Labor and its "industrial criteria" had moved "lock, stock, and barrel" into academic hiring. Mr. Henry's presentation relieves me of that fear; I was very pleased to see his recognition of the special problems which may be involved in *academic* hiring (e.g., low turnover, very limited new hiring even when vacancies do occur, scarcity of minority members in our labor pool, etc.). Mr. Henry's recognition of these problems, and thus the need for *flexibility* in setting interim "goals," I find encouraging.

My problem with Mr. Henry's paper is that I do not see it as presenting much more than this. My difficulty is that, as I read his paper and hear it read again here, I do not find the legal problems and ambiguities surrounding affirmative action in general, and affirmative action in higher education in particular—I do not find these problems addressed, let alone solved. The Civil Rights Commission's invitation to me to serve as a reactor at this conference was to serve as a reactor to a paper on "Federal regulations and case law" relating to affirmative action in higher education. Mr. Henry mentions some Federal regulations (i.e., E.O. 11246, E.O. 11375, OFCC Revised Order No. 4). But he misses other regulations; e.g., he should have pointed out to us the consonance or dissonance between affirmative action and section 703 (j) of the 1964 Civil Rights Act. That section states:

> Nothing contained in this title shall be interpreted to require any employer. . .[etc.] to grant preferential treatment to any individual or to any group because of. . .race. . .[or]. . .sex. . .on account of an imbalance which may exist. . .in comparison with the. . .available work force. . . .

Mr. Henry should have explained to us where, in the face of that provision, is the legal authority for 11246 and 11375—and thus, where is the legality of any affirmative action plan through contract compliance? Different courts have supplied different answers to that question [e.g., *Contractors' Ass'n of Eastern Pa.* v. *Sec. of Labor,* 442 F.2d 150 (3rd Cir., 1971) (11246 *not* based on 1964 Civil Rights Act), and *Legal Aid Society of Alameda County* v. *Brennan,* 381 F. Supp. 125 (D.C. Cal. 1974) (11246 is based on 1964 Civil Rights Act)]. The different answers may have different implications about the scope of the legality of affirmative action. That matter should have been explored for us.

Nor are we told what difficulties in the "good-faith effort" hearings have cropped up—as suggested by the procedural safeguards adopted in, e.g., section 718 of the Equal Employment Opportunities Act of 1972. Finally, I think you should have been told of the recommended—rather than required—affirmative action plan regulations noted and described in 86.3(b) of Title IX of the Educational Amendments of 1972 (86 Stat. 235).

You have been told, therefore, about *some* Federal regulations. You have not been told *at all* about the case law which is developing on affirmative action—and what turns that case law is taking. Let me share with you what I find in that case law.

First, the United States Supreme Court has never decided a case involving the question of the constitutionality of affirmative action. The closest it has come— *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974)—was dismissed by a 5-4 split as "moot." The only judge who reached the substantive issue—Justice Douglas—strongly suspected that the University of Washington Law School affirmative action admissions procedure might be illegal—as violating equal protection rights of white applicants (i.e., constituting reverse discrimination because it did not apply to educationally-deprived white applicants).

Second generalization, the Federal courts have generally endorsed an aggressive affirmative action policy [in addition to the cases I will mention below, see, e.g.: *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d 3 (3rd Cir., 1964), *U.S.* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir., 1971); *Local 53, Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (5th Cir., 1969); *Farkas* v. *Texas Instruments, Inc.,* 375 F.2d 629 (1967)].

However—generalization number 3—this agressive court support has been either in cases involving *proved-in-court* racial discrimination [e.g., *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir., 1971); *Allen* v. *City of Mobile* 466 F.2d 122 (5th Cir., 1972)], or has involved contract compliance affirmative action for *blue-collar job* hiring, particularly involving businesses and unions in the building and construction industries [e.g., *Contractors Ass'n* v. *Sec. of Labor, supra; Southern Ill. Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir., 1972); *Associated General Contractors of Mass.* v. *Altshuler,* 490 F.2d 9 (5th Cir., 1973)]. None of the cases (and please Mr. Henry and Mr. Glickstein correct me if I am in error on this point), *none* of these cases has involved affirmative action in higher education. Indeed, the seminal affirmative action case— *Contractors Ass'n* v. *Sec. of Labor,* the case which upholds the "Philadelphia plan"—contains language which would suggest that an "across-the-board" affirmative action requirement for all colleges and universities holding Federal contracts—that the legality of such a requirement would be highly questionable. Specifically, I am refering to Judge Gibbons' finding of the authority for affirmative action through contract compliance in the *overlap* of the *extreme,* blatant, discrimination of the building trades, and the "cost and progress" dictum, which Gibbons emphasized by relying on the Federal Property and Administrative Services Act of 1949 for the legal authority for affirmative action through contract compliance. In a word, when there is not present the overlap of blatant discrimination and the "cost and progress" rationale, there may not be legal authority for affirmative action through contract compliance.

Finally, let me briefly reemphasize to you that a review of this case law speaks out to the fact that there are still many unresolved tangles in this area of the law. I'll mention just a few.

I. Probably the most frequently argued problem is the problem of "quotas" versus "goals." The critics of affirmative action call them "quotas"; the proponents call them "goals." Mr. Henry, Labor, HEW call them "goals" and repudiate "quota" hiring. In general, the Federal courts have agreed with that distinction and that repudiation of "quotas."

Recent cases, however, are confusing things. One court *upheld* the affirmative action plan which it considered ("the Boston plan")—a plan which it admitted involved, and I quote, "quotas." [See generally, *Associated General Contractors of Mass., supra.*] Also consider these ambiguities and contradictions: *Brown* v. *O'Brien,* 469 F.2d 563 (D.C. Cir., 1972) [judgment vacated and case remanded with directions to dismiss case as moot, 409 U.S. 816 (1972)], which involved a challenge to the recommendations of the credentials committee of the Democratic Party from two States. The court held for the States. At one point (at 573) the court notes: "some required preferences for such groups. . .represent the imposition of *quotas* [emphasis added] which are a denial of equal protection of the laws to those groups that are fenced out." The court then goes on to say that such a situation may be necessary when dealing with employment, but this case is not an employment case and, therefore, quotas are not appropriate here. The court then lists a number of cases where quotas are used and are permissible; the list includes *Carter* v. *Gallagher, supra,* and *Contractors' Ass'n* v. *Sec. of Labor, supra* at 573.

Also consider the position taken in *U.S.* v. *Lathers* (2d Cir.: No. 72–1345; Jan. 2, 1973). In this case the court allows some quotas (i.e., those aimed at correcting past discrimination) but does not allow other quotas (i.e., those seeking merely to attain racial balance). (Such a distinction closely follows the lead of the U.S. Supreme Court in its statements on allowable and nonallowable "mathematical ratios" in *Swann* v. *Charlotte-Mecklenberg,* 402 U.S. 1, 25 (1970).)

II. The placing of the "burden of proof" at the "good-faith effort" hearing may be a problem. [See, e.g., "Both administrators and HEW regional officers have interpreted this shift in the burden of 'going forward' as being equivalent to a change in the Anglo-American system of jurisprudence by making an individual guilty until proven innocent." Sandler & Steinbach, *American Council on Education Special Report, HEW Contract Compliance—Major Concerns of Institutions* (April 20, 1972); cf. judicial acceptance of the placing of the "burden" in *U.S.* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir., 1971); *U.S.* v. *Hayes International Corp.,* 456 F.2d 112 (5th Cir., 1972); *U.S.* v. *United*

Brotherhood of Carpenters and Joiners Local 169, 457 F.2d 210 (7th Cir., 1972).]

III. The "opening wedge" theory of affirmative action through contract compliance—i.e., the view that if one part of an institution accepts a Government contract, then all parts of the institution must have an affirmative action program—may be on shaky legal ground. [See rejection of the approach in *Board of Public Instruction of Taylor County, Fla.* v. *Finch,* 414 F.2d 1068 (5th Cir., 1969).] Rejection of the approach might also be signaled in the "limiting of the radical remedy to the actual offending party" rationale of *Swann, Milliken* v. *Bradley,* 418 U.S. 717 (1974), and even *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

My function being but that of a "reactor" here, I will not attempt to work out any of these problems any more fully. But I trust that I have made my points; that is: First, that there is indeed much case law which may be relevant here. And, second, that that case law is marked by ambiguity, uncertainity, confusion, and contradiction. And, third, there is much that has not been legally tested at all with regard to affirmative action in general, and surely with regard to affirmative action in higher education in particular. I'm afraid that Mr. Henry's presentation did not point that out to you. I think you should be aware of the present state of the case law. I believe, and I hope you share my belief, that all this counsels caution and circumspectness in the making of affirmative action policy with regard to higher education.

DISCUSSION

VICE CHAIRMAN HORN. Mr. Travers, are you familiar with the document of August 18, 1975, signed by Martin H. Gerry, Acting Director, Office for Civil Rights, Department of HEW, entitled "Memorandum to College and University Presidents"?

MR. TRAVERS. Yes.

VICE CHAIRMAN HORN. Was that drafted in consultation with the U.S. Department of Labor's Office of Contract Compliance?

MR. TRAVERS. Yes.

VICE CHAIRMAN HORN. In your judgment, does that conform with the guidelines that Mr. Henry set forth in the testimony as to the "must and should"? In other words, the "shall and may" of Revised Order 4?

MR. TRAVERS. Well, we tried to reflect in the paper some of the concerns that were coming up in our own hearings where the format is quite open and people are free to raise problems in terms of what they think the regulations should be, as well as the way they are enforced.

In Order 14 there is a provision for the development of nationwide formats for affirmative action programs that contractors or industries can follow in lieu of line-by-line data requirements that would be necessary under Order 4.

There is a nationwide format for the banking industry. There are nationwide formats for several large defense contractors that recognize the special kind of problems in submitting data and that the specifications, particularly of the work force analysis and the utilization analysis, may not match up exactly with their own payroll records and the way they do business.

That provision of the regulation led to the development of a nationwide format for colleges and universities.

VICE CHAIRMAN HORN. Was there anything the Department of Labor wanted in this latest order from HEW that HEW refused to put in?

MR. TRAVERS. Not that I am aware of.

VICE CHAIRMAN HORN. So you feel this faithfully carries out the intent of the Department of Labor in terms of its understanding of the law as to what higher education contractors in this case should be doing?

MR. TRAVERS. It covers only a part of it. After all, this was published in the *Federal Register* concurrently with our opening of hearings on the subject of what the regulations should be for colleges and universities, so it was not published as a final answer while we were still collecting suggestions. It does talk about what we think can be a way that may help the colleges and universities understand the data reports and what needs to be submitted in affirmative action programs and how they should go about establishing goals and timetables. There are problems that some people are raising in terms of the regulations, and those are being addressed, including perhaps changes in data format and how the timetables are set.

VICE CHAIRMAN HORN. I would like this memorandum of August 1975 included at this point in the record as an exhibit.

CHAIRMAN FLEMMING. Without objection that will be done. Exhibit 1.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

VICE CHAIRMAN HORN. Let me ask you, Mr. Glickstein. I am curious about the burden of proof argument. You have not only been a very excellent counsel to this Commission, a very excellent staff director, but you have had experience at a university.

Based on your deep knowledge of civil rights and the law, and administrative regulation, and your experience in various public organizations, would you care to reflect and comment based on your experience in the university on matters such as the fragmentation of hiring practices perhaps that exist, and what you see as the problems of the university in structure, other than any venality that might appear or lack of perception and sensitivity? Can you comment on your experience at an illustrious institution headed by a former chairman of this Commission?

MR. GLICKSTEIN. Some of the problem is that universities still use inadequate recruiting techniques. They don't fully understand how to go about recruiting minorities and women.

One problem is that many universities have entrusted the responsibility of affirmative action to members of the university staff with other responsibilities as well, and carrying out an affirmative action program has become a rather complex process.

You can't expect a director of personnel who is also trying to do all the other things he has to do to also be an affirmative action officer. You can't expect the university vice president for academic affairs to also be an affirmative action officer.

The Commission can reflect on what it does internally, where there are individuals who have affirmative action responsibilities for the Commission and do nothing else but that and the Commission sets aside some portion of the budget for affirmative action matters.

In many of the universities that isn't done. I think the net has not been widely enough cast in many of the universities. A lot of universities are just very put out with having to do more than they have traditionally done to hire new faculty members.

It was very easy for the chairman of one university department to say to the chairman of another department in another university, "I will take one of your graduate students if you take one of mine." And that was the way it was often done, and now, having to go around to conventions recruiting people and having to send out lots of letters—many people find that unpalatable.

In addition, to the extent that there is a dispersal of responsibility for hiring and recruiting, again in many universities the prime responsibility is placed on the department chairmen, and the department chairman are also very busy people. Often a department chairman, perhaps without any venality, does seek the easy way out. Many universities haven't provided the assistance that should be provided to the department chairman to adequately carry out these plans.

VICE CHAIRMAN HORN. It's an interesting point of fact, your last statement, and I frankly don't know the answer. I don't think it's quite fair to say the burden is on the department chairmen. It's usually a changing search committee, depending on the particular professorship to be filled, and many of the faculty on it have no experience in conducting a search and this gets back to my earlier question of the last panel.

Is affirmative action really affording to a university an opportunity to set certain standards, which I think might improve the quality of faculty in the long run just by the very nature of having to follow a process that has certain equities and standards and explicitness in it, as opposed to the happenstance of which most hiring occurs or has occurred? Would you think that is a fair statement?

MR. GLICKSTEIN. I think so. I have seen moves to regularize the process, and some of those moves have sort of been very enlightening to the people that do the hiring and recruiting. It never occurred to them here were certain sources available to look for minorities and women. By forcing them into the position of regularizing this process, I think they improved the process at the same time.

While it is true there are search committees, ultimately the department chairman and dean can affect the composition of the search committees. Sometimes a promotion committee had been particularly resistant to hiring women or minorities, and the department chairman or the dean has succeeded in changing the membership of the committee to overcome that resistance.

VICE CHAIRMAN HORN. Mr. Glicksten, you are a lawyer and you know a lot about the problems of fairness, equity, etc. How does it strike you if a faculty member or a university administrator says, "Now look, when I have an incompetent member of the administration or the faculty—unless one is tenured and then it becomes very difficult—and I want to take action, there are grievance procedures that the person against whom the action is taken can pursue. There are judicial processes that one can pursue. But, when that incompetent happens to be either a woman or a member of a minority group, I am faced not only with the grievance procedure and the judicial process, but in addition I am faced with the State FEPC in the case of California—Fair Employment Practices Commission—and similar groups—EEOC, Equal Employment Opportunity Commission—as well as the HEW Office for Civil Rights field enforcement."

Do you have any reflection as to how many mechanisms are needed on a particular case? I am looking at this now as an administrator of a rather large institution. When you remove incompetents—and I have removed many more white male incompetents than minorities—but when you get in the "covered areas" you may be challenged from all directions by eager beaver agencies that will come in and investigate, and while I have a certain sympathy, I say, "Wait a minute, how many times do I have to be investigated on this score?" Do you have a solution for this process?

MR. GLICKSTEIN. I don't have a solution. I think some of the Federal agencies like OFCC, the Justice Department, and EEOC should make some effort to coordinate their operations better and perhaps share their investigative powers. But I think it is not uncommon that persons aggrieved have many forums in which to test their grievances.

The U.S. Supreme Court claims that it is a burden because they see so many appeals from Federal prisoners. The route isn't ended when your conviction is upheld by a State supreme court. They have a whole Federal process to go through. You go through numerous groups to get your initial conviction reviewed. In ordinary labor union grievance

procedures, the employee has a recourse to any number of agencies: NLRB, arbitration procedures, the courts.

I think there should be better coordination, and I think to the extent that the universities are able to make a good case, I don't think that they could be harassed. I appreciate the degree of paperwork.

I think a lot of Federal bureaucrats have some common sense. I think that when a university that has very few women, very few blacks on the faculty is charged with discriminating, it is likely that many Federal agencies would look very closely at what that university is doing.

On the other hand, a university with a good reputation for affirmative action and a good reputation for having blacks and women on the faculty, it is probably less likely that the Federal agency would come down as hard on that university as on some others because the reason to be suspicious is not existent.

COMMISSIONER FREEMAN. Mr. Travers, since you are here from the Department of Labor, there is one question I have. It's not necessarily related to institutions of higher learning. That is, the concerns that have been expressed from time to time that a respective collective bargaining agreement is in conflict with the affirmative action plan. What is the position of the Department of Labor when that occurs?

MR. TRAVERS. Respecting collective bargaining agreements generally, the agreement could not be used to override a requirement of equal employment opportunity under the Executive order and could not be used as an excuse by the employer for not being able to take affirmative action or remedy the effects of past discrimination. It just would not be that kind of an offense.

The issue is sometimes more narrowly framed in terms of seniority: how the seniority provision of a collective bargaining agreement would affect the affirmative action obligations of the employer. That issue is being addressed in the courts. The Labor Deparment, of course, follows these decisions.

COMMISSIONER FREEMAN. Are you saying the Labor Department hasn't taken a position on that issue now?

MR. TRAVERS. The problems have mostly involved Title VII. The Labor Department's position has been that seniority by itself does not create the problem. Bona fide seniority systems would be allowed to stand.

Certainly, where there would be a case of someone who had been specifically discriminated against in the past in being denied employment, for example, and then later hired and being forced to be laid off, we would feel that he or she should be given some recognition in terms of the seniority they would have had but for that discrimination.

As a general matter, the seniority provisions themselves are not creating those kinds of problems, and the issue is really before the courts anyway.

COMMISSIONER FREEMAN. Thank you. I would like to inquire if Mr. Glickstein has any comment on that.

MR. GLICKSTEIN. I agree that what Mr. Travers said about conflict between the collective bargaining agreement and the employer's obligations under the Executive order prevails. I think on the question of seniority, my own view is that there is a conflict between seniority and affirmative action. I do think that some more has to be done that hasn't been done so far to resolve that conflict.

I think it's not enough to limit the beneficiaries of affirmative action to individuals who themselves were the subject of discrimination. For example, in the Watkins case—it was Alabama or Louisiana—where the lower court had found that laying off people in reverse order of seniority was discriminatory, that you can't lay off the last hired because they all happened to be black and if they were laid off, there wouldn't be black employees.

That was reversed by the court of appeals, who said these blacks who were being laid off are all very young men. They themselves had never been victims of discrimination. They themselves had never pounded at the door of the can company to get a job. They are not entitled to any preferences. Why should they replace a 50-year-old white? Well, I think that is a very narrow view of who is the victim of discrimination.

Louisiana for generations had a whole conglomeration of discriminatory laws going from the cradle to the grave. Those laws had an impact on the parents of the blacks today seeking jobs in steel mills. But for the existence of those laws, maybe those young black men and women would be trying to be doctors, lawyers, and university professors. They had been the victims of discrimination, and I think it's too narrow a view to say that merely because a particular individual hasn't knocked at a door for a job, that that individual, a black or a woman, is not entitled to some sort of preference.

May I comment on some of the cases that Professor Sherain discussed? I guess we come from different schools of jurisprudence. Professor Sherain says the *Eastern Contractors* case only applies to the Philadelphia plan and that there hasn't been any general approval of affirmative action plans.

After the *Brown* decision was rendered, many people said that only applied to Prince Edward County, Clarendon County, Topeka, and Wilmington—nowhere else. The Supreme Court didn't believe that. A few days after the *Brown* case, it ruled illegal separate but equal treatment at golf courses, libraries, and half a dozen other places of public accommodation.

The Supreme Court refused to review the *Eastern Contractors* case and also the one coming from the First Circuit involving Massachusetts. I believe it can be said that affirmative acion plans have been approved by the Court.

Professor Sherain pointed to language in Title VII that says "there shall be no preferential treatment." He conceded that probably didn't apply to affirmative action plans under the Executive order. It wouldn't even apply to affirmative action plans or preferential treatment under Title VII if there had been a showing of past discrimination. It doesn't apply to the Executive order.

It is not clear, Professor Sherain suggests, on what authority the Executive order is based. There have been other instances besides this one Executive order where the right of the Federal Government to set terms and conditions of contracting have been questioned, and the courts have generally said that the Government can set any conditions it wants on their contracting unless they are totally arbitrary and capricious.

There was an opinion rendered by Attorney General Robert Kennedy that thoroughly documented the constitutional basis of the Executive order. A similar opinion was rendered by Attorney General Mitchell, more specifically directed to the Philadelphia plan; so we do have some authority there.

COMMISSIONER SALTZMAN. May I make this point absolutely clear in my own mind? If there is proven past discrimination, then section J, to which Professor Sherain referred, does not apply with respect to preferential treatment?

MR. GLICKSTEIN. That is correct.

COMMISSIONER SALTZMAN. Does Professor Sherain want to respond to that? I want to make that absolutely clear here.

MR. SHERAIN. Title VII of the 1964 Civil Rights Act, two-thirds of the way through the title, "reaffirms the authority of the court to grant affirmative action relief in those cases where there is proof to the court of racial discrimination."

VICE CHAIRMAN HORN. Would Mr. Glickstein argue it's broader on a proved case-by-case, in-court basis?

MR. GLICKSTEIN. The provisions of Title VII we are talking about now. There the courts have said that, if you demonstrate that there has been some discrimination, it's possible for the court to issue a preferential order of some sort. In cases such as this, the courts have ruled, for example, that in hiring you have to hire one for one, black for white.

That is obviously preferential treatment of some sort, and the courts have said, when there has been intentional past discrimination, then the provisions of Title VII that preclude preferential treatment are not applicable.

COMMISSIONER SALTZMAN. What about Dr. Harris' point that, in the hiring across the board on the university level, there has to be preferential treatment for a period of time. Do you consider this a legally sound statement?

MR. GLICKSTEIN. Yes. Well now, we are not talking about what is appropriate under Title VII. We are talking about what is either good social policy or what the President can require under an Executive order. I do agree with her. I think for a period of time there has to be an effort to overcome the effects of past discrimination.

Again, to deal with this question on the assumption that there hasn't been discrimination in universities, that universities have been pure, I think is very unrealistic. In addition to dealing with many universities that perhaps have never had overt policies of discrimination, we are dealing with a large block of universities in this country that had such policies, just as the racist labor unions had discriminatory policies imposed by State law or their own regulation. There has been a pattern of discrimination.

Professor Sherain mentioned the *De Funis* case and said that affirmative action of the sort involved in the University of Washington was illegal. That is not what Justice Douglas said. He said the case should be remanded to determine whether there were some factors in addition to race or other than race that would justify the policy that the University of Washington Law School was following. For example, if it were concluded that the tests that were given had an adverse impact on minorities, maybe the policy that the university was following would be appropriate.

The Title VI case that Professor Sherain referred to dealing with the question, "if there is some discrimination at the radiation laboratory, can you also require affirmative action by the literature department?" The case Professor Sherain referred to involves Title VI, and the statute deals with that question.

The pinpoint provision of Title VI says, "such termination of funds or refusal shall be limited to the particular political entity or part thereof or other recipient as to whom such a finding has been made and shall be limited in its effect to the particular program or part thereof."

So the courts did say, well, on the basis of that language, if you discriminate in the adult education program, funds can be cut off there but not across the board. It doesn't say that in the Executive order.

In the *Keyes* case in the Supreme Court, involving the Denver school system, there the Supreme Court said, within a particular school system, just like within a university or within a particular company, if you find discrimination in one part of that school system you can require desegregation throughout the school system.

That case is more analogous to the literature and the radiation laboratory than the case involving Detroit and the suburbs. That would be like saying if Harvard desegregates, you have to require MIT to desegregate.

COMMISSIONER SALTZMAN. I wonder whether we might pursue a bit further the problem that universities face when they are charged with

"reverse discrimination" because of their efforts to apply an affirmative action program.

Seeing a past discriminatory hiring program and thereby engaging in an affirmative action program, suppose they hire someone who is generally qualified under the description given by Dr. Harris earlier, but they give preference to that person because that person is black. However, there is a white male who, with academic qualifications or whatever, might be conceivably listed as being more qualified, and he sues the university on the basis of reverse discrimination. What is their defense?

MR. TRAVERS. It can be a problem. Order No. 4 prohibits a contractor from discriminating against anyone on the basis of race or sex.

COMMISSIONER SALTZMAN. I am not using the word "discrimination," but "preferential treatment" in order to create the kind of equity that Dr. Willie was talking about.

MR. TRAVERS. You are talking about that in a case that results in denying a job opportunity to someone presumably on the basis of race or sex. That part of the problem is much easier to explain than the other conditions that you attached. If you are talking about selection standards that involve peer-group review or involve individual assessment, it's very hard to describe one as really being somewhat better qualified.

The selection standards and criteria need to be addressed in terms of applying some specific standards and being able to demonstrate that they are related to performance on the job. You really can't describe someone as being

COMMISSIONER SALTZMAN. Dr. Harris was saying a priority, let's give the black person two extra credits. Would you hold that to be

VICE CHAIRMAN HORN. I don't know if that is a fair statement of what Dr. Harris said. That was relating to a question of veterans' preference. She used that example to say the Government has decided to award certain individuals, based on their status, certain preferential treatment.

She implied that could be done, but when asked specifically, she said it would set the standards for a particular job and if a person comes in at 80 percent, and that is the minimum level of competence but they are qualified to do the job, and that person happened to be black or a woman and the department happened to be underutilized in those areas, that person would be picked above one that came in at 90 percent or 100 percent who was the white male. That is the way I understood the example.

MR. TRAVERS. I guess the question is, how are these scores assigned and what does the difference between 80 or 90 mean? The difference really means that you have some way of measuring what people can actually do on the job. If those extra 10 points mean that

someone is clearly better qualified on the job, the better-qualified person should be hired. The basis behind Order 4 is that the affirmative action program and the goals that are set are attainable goals in relation to the people who are available to be hired with reference to skills. And the level of goals that are being set is not at the kind of level that will require that kind of action.

COMMISSIONER SALTZMAN. When they are equally qualified and the black person is chosen in order to achieve equity in the faculty

MR. TRAVERS. Two people are equally qualified on some objective measure?

COMMISSIONER SALTZMAN. Not always objective. Merely on Dr. Willie's point. A good faculty ought to be a diverse faculty so that looking at their faculty they say, "We ought to have some blacks in this department." Merely because the black person is black, they are hiring him for that reason alone.

MR. TRAVERS. That isn't the example you gave. You gave the example of two people who are equally qualified. The real problem is: You never get to that proper score of 80. You are not really talking about a way of being really able to differentiate those fine levels of

COMMISSIONER SALTZMAN. What I am saying is: Does the Department of Labor recognize the validity of a university's hiring a person because they are black and discriminating at that moment or showing preference against the white person?

MR. TRAVERS. I don't want to be argumentative, but what we are requiring under Order No. 4 is that contractors set goals and find people who are qualified for the jobs and hire those people and not discriminate against other people in doing that. So what we are saying is they have to find qualified people for the job and not turn down more highly qualified white applicants on the basis of race.

VICE CHAIRMAN HORN. Let me pursue Commissioner Saltzman's point a bit and use that particular example.

Suppose a department of sociology studying urbanization said, "We think it's important for the reasons Dr. Willie gave, that because of the search for truth, the different ideologies, perceptions, and approaches to the same subject matter, we will give 10 points in this search for an associate professor for one of diverse cultural background and experience"? The department decides to do this because it is all white. There are three or four candidates, one of whom is black who gets the 10 points for diverse background and experience.

If a charge was made that this were inappropriate, would HEW or Labor rule that it is inappropriate to give 10 points for that "diverse cultural background," which translates into a criteria based on race or color?

MR. TRAVERS. The answer would be yes. The charge would have some validity unless race or national origin were a bona fide

occupational qualification for that job. That goes to the character of the job, not the desires or preferences of the employer or department.

VICE CHAIRMAN HORN. In other words, there would have to be a positive showing of proof in a charge like that by the university that one could only gain that perception or that approach to truth by being of a particular color or race, and you could not gain that perception intellectually through learning.

MR. TRAVERS. That's right.

STAFF DIRECTOR BUGGS. I am not sure that necessarily holds. I would think it would be possible for a white person who lived all his life or her life in that kind of setting in, say a black family—that is not totally without example—to qualify on the basis of that description of what one is looking for. I don't think it necessarily has to be a matter of race, although most of the time it is.

MR. TRAVERS. I asked if that was being applied only on the basis of race. If you can describe characteristics required for a job that are described in terms of qualifcations people have without regard necessarily to race or national origin, then

VICE CHAIRMAN HORN. It goes beyond merely a white person living with a black family. It goes to some objective way to prove that, only by such experiences to you, can you contribute to the search for knowledge, by having that experience, and that you can gain that experience in no other way. A similar example would be to say that one at a university can't study murder unless one committed a murder. Most of us would agree that is nonsense. One can study murder and death without dying.

STAFF DIRECTOR BUGGS. I know a great many people who claim to be black who—neither you nor I, by looking at them could say that—who have had precisely the same kind of experiences that I have had because they were assumed to be black because they lived in a black community or lived in a black home. In fact, a couple of people around here right now who I think have had just as much of an experience of being black as I, but you wouldn't know it from looking at them.

VICE CHAIRMAN HORN. Conversely, just because you have been black doesn't mean you have had "the black experience." You can be more upper white middle class in class background than most of us at this table.

MR. GLICKSTEIN. I think though, considering the matter of social policy about whether it would be appropriate for an all-white department, for example, to consider the color of somebody that applied for a job as a factor, as an educational question—the department would be justified in saying that would add to the intellectual stimulation of being a member of this department and probably add to the education of the students at this university.

For example, in New York State there is a law that says students may not be assigned to schools on the basis of race. The New York Board of

Regents decided that school integration was a desirable thing as an educational matter and instituted a number of programs where students were moved so there was a racial mix of the school. This was challenged as violating the New York laws.

The board of education said, "This is being done for a valid educational purpose," and that was sustained in the courts. It wasn't because of race. It was because of an overriding educational policy of the State of New York. Integration furthered the education of schoolchildren.

VICE CHAIRMAN HORN. You make a good point. One could argue in a university, where you are trying to educate students from minority backgrounds, it's important to have role models because much of the education occurs not simply in the classroom, but outside of the classroom in terms of advising, counseling, and so forth of these students as they decide what career they wish to pursue.

MR. GLICKSTEIN. I am sometimes a little bewildered when people find it difficult to understand the values of diversity when you are talking about minorities and women, but for years the universities in this country have been stumbling over their feet to have geographic distribution. If you were a young man from Wyoming, your chances of getting into Yale or Harvard were 100 times better than if you were from Manhattan. The geographic diversity was important. However, in this country today I would think that geography is probably an inconsequential factor. Wherever you go today, you have the same TV programs and McDonald's.

VICE CHAIRMAN HORN. Any further questions? Let me go back here a minute and ask Mr. Travers: Are there any plans by the Department of Labor, perhaps in consultations with HEW, to draw up a model affirmative action plan rather than have 3,000 colleges and universities reinvent the wheel and to develop many different plans? You could also provide a computer program to process the data.

All over America, we are struck at universities and colleges with the problem of the management of personnel data. I would argue, as I have said twice today, that the affirmative action plan helps a university get its own house in order for management reasons that go beyond the mere requirements of affirmative actions, but I would also argue that rather than have 3,000 of us reinvent the wheel each day on American college campuses, it would be useful if a Government agency, in consultation perhaps with the American Council on Education, could help provide the basic model for us to adapt in any way we want. But the basics would be there. Do you have a comment on that?

MR. TRAVERS. The trouble is that the problems differ from one location to another. The tendency is to include everything in a model: detailed analysis of each individual personnel action without reference to whether or not there are any real problems there.

The university's time and the Government investigator's time is better spent where there are problems. The format, though, that was published on the 25th is meant to move towards that in terms of the required data that needs to be submitted with the affirmative action program.

This is a way, if universities want to follow this format, that would be acceptable in terms of just the common data that is submitted with an affirmative program. The policies and the programs leading to positive action would have to flow from whatever problems that data show.

If people have some other comments on specific models or changes in even those suggestions, then the current hearings are really the appropriate place for it.

VICE CHAIRMAN HORN. I think it would be immensely helpful if the Federal agencies involved could develop some of these models. I think the August memorandum is a start, but we need the software that goes with it so universities could help process this data. The small liberal arts colleges don't know where their next dime is coming from. They really don't have that much expertise in computer programming—most of them don't have computers available to get at this. That is one of the problems here. They are also shorthanded on people to help administer these programs.

MR. TRAVERS. I am not sure the Government's recent experience on computer programs lends itself to be called that much of an expert.

STAFF DIRECTOR BUGGS. When the last panel was here, you raised a question about seniority and qualified people. I wonder if Mr. Travers would like to take a shot at the extent to which seniority in a labor union or any organization is really antithetical to the merit promotion idea.

MR. TRAVERS. I think the usual argument for seniority doesn't really have anything to do with merit. Unions and others who are arguing for provisions based on seniority aren't really trying to say that there is merit involved in length of time on the job, at least once you get past some minimum period of time. What it really is, is provision for job security and a general protection for all the workers.

STAFF DIRECTOR BUGGS. Would the Labor Department have a position on this?

MR. TRAVERS. Certainly, where there is just a general adherence to promotion with some regard to seniority, it is appropriate in many cases to talk about direct promotions in order to move minorities and women into jobs where there is a large degree of underutilization.

When you talk about a strict line of progression in terms of seniority and there is just automatic movement up and down the line on the basis of seniority and essentially seniority only, our position there would be that we would focus on the entry-level job and the seniority provisions would take care of the movement up the line.

STAFF DIRECTOR BUGGS. In 20 or 30 years maybe.

MR. TRAVERS. Usually where seniority is that automatic of a consideration, it would take place much quicker. Of course, economic conditions can have a large say in that.

VICE CHAIRMAN HORN. Mr. Buggs raises a very pertinent point there. Many university faculties in times of a tightening market and with declining level of student enrollment are very resentful of any faculty member brought in above the rank of assistant professor because they see less opportunities for those already on board for 5 or 10 years to become a full professor. They fear a narrowing of the slots available. Therefore, when you try to make up for underutilization in the past, when it's *de facto, de jure,* or whatever excuse, you do face the problem that, if you have concentration only on the entry-level positions and not on an opportunity to spread individuals throughout that hierarchy, that you will continue to work adversely against opportunities for women and minorities.

MR TRAVERS. I think people must realize there is a difference between affirmative action and just operating under law in terms of equal employment opportunity. Hiring and promoting people on the basis of their ability and in relationship to their availability in the labor market is what you would expect from anyone practicing equal employment opportunity.

Affirmative action means something more. It means a Government contractor under the Executive order has to move faster towards full and prompt utilization, and that means taking affirmative action to find qualified people at all levels. Past employment practices of any employers, incuding the university, are going to develop expectations among the employees, and those expectations can be based on past exclusionary and discriminatory practices. Those kinds of expectations being challenged are necessary as part of affirmative action.

VICE CHAIRMAN HORN. I would like to ask you along this line. It seems another way the Department of Labor could be helpful: You have the Bureau of Labor statistics. You have manpower projections that you make over a 10-year period. Couldn't the Department of Labor take a role in giving colleges and universities statistics, coordinate it so we would know how many sociologists of a particular ethnic group, or female, etc., are being produced in America and are available in a national labor market? Most of us are recruiting in a national labor market.

MR. TRAVERS. That is a very strong request from the hearings, from people on all sides of the issue, and I am sure that will receive a lot of attention.

VICE CHAIRMAN HORN. This would be immensely helpful. Any other questions? I just have one final statement. At the conclusion of the last panel, I said memory told me that most black Ph.D.s were trained in very few departments. It turns out my memory is correct. Let me just cite it.

Thomas Sowell's paper, which will be before us tomorrow: "Affirmative Action Reconsidered." He notes: "Despite loose talk about recruitment procedures, they tend exclusively to reach white males. The impact is that, one, most black Ph.D.s were trained in a very few highly rated predominantly white departments; and, two, a slightly higher proportion of the female doctorates received their Ph.Ds from the top 12 universities." His citation on that is the article I had cited previously, Kent G. Mommsen, "Black Ph.D.s in the Academic Marketplace," who notes in this article that: "At the Ph.D. level blacks tend to receive their degrees from large, prestigious, predominantly white institutions of higher learning outside the South and that 50 percent of all black Ph.D.s come from just 10 institutions."

By comparison, for academics in general, the top 10 producing universities granted 35.8 percent of the doctorates—that is from David Brown's "The Mobile Professor."

You don't have to get into an argument of qualified and qualifiable. The basic data indicates that many if not most black Ph.D.s are already being graduated from the best universities. The question then comes as to the number and quantity much more than the quality.

Third Session: HEW Guidelines and Actions

CHAIRMAN FLEMMING. The hearing will come to order, please. This morning, as you have noted, we are scheduled to discuss Health, Education, and Welfare guidelines and actions as we think in terms of affirmative actions in employment in the field of higher education.

We are very, very happy that it is possible for Peter Holmes, who is Director of the Office for Civil Rights of the Department of Health, Education, and Welfare, to be with us to make the opening presentation. Mr. Holmes has been ill for the last several months. He is just back in circulation, and we are very grateful to him for his willingness, after having just returned to work, to come and discuss these matters with us.

As indicated, we will listen to the reactions of Mordeca Jane Pollock, coordinator of the complaints division of the National Organization for Women, and William Taylor, director of the Center for National Policy Review, Catholic University of America Law School. As many of you know, Mr. Taylor is another person who spent considerable time in providing leadership to the Civil Rights Commission. The leadership he provided was very distinguished, very effective, and very meaningful. We are very happy to welcome him back to participate in this program.

Paul Seabury, who is professor of political science at the University of California at Berkeley, may not get here by the end of the morning session. If he does not, he will make a presentation at the opening of the

afternoon session. On the other hand, he may be here before the morning session ends.

So, at this point, I am very happy to present Peter Holmes. We are delighted to hear from you at this time.

PRESENTATION OF PETER HOLMES

MR. HOLMES. Thank you. Mr. Chairman, members of the Commission, Ms. Pollock, Mr. Taylor, and guests, I appreciate the opportunity to participate in this consultation on affirmative action in employment in higher education. It is my understanding that copies of former Secretary Weinberger's statement to the Department of Labor's factfinding hearing have been distributed to the members of the panel. The views and proposals expressed in that statement represent my presentation to this consultation.

Statement of Caspar W. Weinberger, Secretary of Health, Education, and Welfare

The Department of Health, Education, and Welfare welcomes the opportunity to present its views concerning implementation of the affirmative action requirements of the Executive order as applied to employment at institutions of higher education.

Executive Order 11246, as amended, has as its primary purpose ensuring equal opportunity for all persons without regard to race, color, religion, sex, or national origin employed or seeking employment with Government contractors or with contractors performing under federally-assisted construction contracts. The Executive order bans discrimination against any employee or applicant for employment because of race, color, religion, sex, or national origin and requires that Federal contractors take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. The Executive order further provides that such affirmative action shall include, but not be limited to, initial employment, upgrading, demotion or transfer, recruitment, layoff or termination, rates of pay and other forms of compensation, and selection for training.

In order to carry out these requirements, the Secretary of Labor issued on December 1, 1971, Department of Labor (DOL) regulations (referred to as OFCC Affirmative Action Guidelines) covering all Federal contractors and subcontractors. These regulations, now known as Revised Order No. 4 (last amended on July 12, 1974), set forth detailed substantive and procedural requirements with respect to the development of affirmative action programs.

On January 14, 1972, the Department of Labor issued regulations (entitled "Order Establishing Standardized Compliance"), and now known as Revised Order No. 14 (after subsequent revision on February 6, 1974, and July 12, 1974), which established standardized contractor

evaluation procedures for compliance agencies in their review of affirmative action compliance programs. These two regulations, Revised Order No. 4 and Revised Order No. 14, thus form the legal framework within which all compliance agencies, including HEW, are required to work in order to carry out their enforcement responsibilities under Executive Order 11246.

The major substantive requirements of the current Department of Labor regulations with respect to the content of affirmative action compliance programs are as follows:

1. A utilization analysis which compares the percentage of minorities and women in a contractor's work force with the percentage of minorities and women in the relevant general labor market.
2. In the event that this comparison reveals a lower percentage of minorities and women in the contractor's work force, the establishment of hiring goals and timetables to overcome such "underutilization."
3. An analysis to determine whether there has been an adverse impact on minorities and women in any of the following types of employment areas:
   a. Recruitment.
   b. Selection.
   c. Placement or assignment.
   d. Promotion.
   e. Granting of tenure or job security.
   f. Transfer.
   g. Salary or compensation.
   h. Provision of fringe benefits.
   i. Availability and suitability of training.
   j. Separation or termination.
4. In the event that any analyses in any of these areas reveal an adverse impact on women and minorities, a further, indepth analysis must be conducted to identify the specific factors which have created the adverse impact. Having identified such factors, the contractor is required to develop an action-oriented program to overcome the adverse effects.
5. If the factor causing the adverse effect is a test (defined as virtually any objective standard), then, in addition, the test must be validated pursuant to another set of Department of Labor regulations or its use discontinued.
6. Affirmative action policy statements must be developed and disseminated and other miscellaneous administrative actions must be outlined.

The major procedural requirements of these same regulations are:

1. Within 120 days of receiving its first contract, each contractor is required to develop and maintain on file an affirmative action compliance program.

2. The compliance agency is required to conduct both "routine" reviews of affirmative action programs and special preaward reviews whenever a contract in excess of $1 million is to be awarded to a given contractor.

3. Either type of compliance review is initiated by a request from the compliance agency to the institution for a copy of its current affirmative action plan. In the case of routine reviews, the compliance agency has a period of 60 days after receipt of an affirmative action plan to evaluate its sufficiency and reach a determination. In the case of preaward clearances, if the compliance agency has not conducted a compliance review of the same contractor within the preceding 12 months, the compliance agency must obtain and evaluate the sufficiency of the affirmative action plan within a period of 30 days. The substantive standards for evaluating the plan so submitted are the same in both cases.

4. If the compliance agency determines that the plan is not acceptable, then the regulations require that a show-cause letter be issued to the contractor, providing the contractor a 30-day period in which (1) to demonstrate that the contractor is actually in compliance (i.e., the initial determination of noncompliance was erroneous); (2) to perfect the affirmative action plan; or (3) otherwise show cause why enforcement action shouldn't be commenced. In the case of the preaward review situation, this period is collapsed into the single 30-day preaward clearance period.

5. If the contractor does not either successfully contest the finding of unacceptability, correct existing problems or enter into an acceptable conciliation agreement to correct the remaining deficiencies identified in the show-cause letter, then the regulations require that a hearing be convened for the purpose of determining whether the contractor should be debarred from existing and future contracts.

A major question related to the administration of this regulatory scheme has arisen with respect to the application of both its substantive and procedural requirements to higher education institutions, particularly in regard to the academic employment area.

While I believe, based on our own observation and experience, that most of the substantive requirements of current DOL regulations and policies are workable and productive in the nonacademic employment setting, I have concluded that some of these provisions ignore important affirmative efforts which could be made by colleges and universities, while others are simply unworkable and counterproductive in the area of academic employment. This dysfunction, in my view, occurs uniquely in the academic employment area of higher education institutions because of several important and traditional aspects of university life. For example, the current regulations—with a total emphasis on the demand side of the academic employment market—have placed the entire thrust of current affirmative action enforcement

on the question of the proper distribution of those persons already in the available pool and have ignored the equally important issue of entry by minorities and women into the available pool. This skew is particularly serious from the standpoint of academic employment for minorities where current *availability* in many academic employment pools is often less than 1 to 2 percent. A supply-side emphasis would appear to be much more relevant to the interests of improved employment opportunities for minorities. This is particularly true because of the fact that colleges and universities for the most part control the access of persons to the academic employment pools from which they recruit. Because most academic employment positions require that any "qualified" applicant possess at least an undergraduate degree (and, usually, at least one or more graduate degrees) and because such degrees are exclusively granted by higher education institutions, the possibility exists for a unique contribution by this type of contractor on the supply side.

While avoiding the specter of preferential admissions, this Department has successfully pursued this type of affirmative action approach as part of the remedy developed pursuant to Title VI (Civil Rights Act of 1964) enforcement efforts with regard to eight previously segregated higher education systems. Focusing both on special recruitment efforts and supportive service programs to improve retention of currently-enrolled students, the added requirement of affirmative action effort on the supply side of the employment process could, in my judgment, substantially improve the overall success of the Executive order program. This added focus could also dramatically improve the development of truly reliable data (in contrast to the "soft" data currently available) on the availability of minorities and women for various types of academic employment.

A second set of concerns with the interface of current DOL regulations (particularly those of Revised Order No. 4) and unique aspects of the academic employment context relates to the utilization analyses of all major job categories required by 41 C.F.R. 60–2.11 and indepth analyses of various employment practices (including the total selection process; transfer and promotion procedures; training programs) required by 41 C.F.R. 60–2.23. While these requirements represent a laudable effort to mandate a detailed self-examination of the impact on minorities and women of both initial employment decisions and postemployment treatment, they are based on an employment model which assumes a firm, administrable conception of job criteria and performance, which is wholly inconsistent (for all but initial employment) with the fact that the roles and criteria of academic positions in universities are complex, varied, and vague, often involving intertwined considerations of teaching ability, scholarship, and community service in an employment process which places great emphasis on peer-group evaluation and selection and faculty self-

governance. Apart from these policy considerations, our practical experience has been that these analyses (excluding the utilization analysis for entry-level academic positions), if conducted in a manner consistent with the spirit of the current regulations, inevitably require lengthy periods of time to prepare and numerous negotiation sessions to attempt to perfect. The requirement of these analyses is without question the major contributor to the protracted delays in affirmative action compliance programs and, in retrospect, they rarely produce any real insight into the complex maze of factors which, for example, may affect a tenure decision. The difficulty of conducting the current analyses is exacerbated by the requirement of 41 C.F.R. 60–2.13 (d) that analyses be conducted at a level of detail sufficient to identify problem areas by organizational unit and job classification. This would, in effect, require a separate analysis for each job classification (e.g., assistant professor, associate professor, full professor, lecturer, teaching assistant) within each academic department (ranging anywhere from 20 to 80 for most universities) for each employment practice analyzed. For example, at a large university, thousands of separate analyses could well be required, even though no evidence of discrimination existed and no complaint had been made. Rather than contributing to true improvement in equal employment opportunity, I am convinced that a continued demand for this type of complex and expensive self-analysis (coupled with a requirement for nonentry-level goals and timetables) is an unreasonable and burdensome requirement on college and university contractors which is unworkable and likely to encourage the lowering of academic employment standards or a resort to preferential treatment.

In my view, the objectives of the current "affirmative action" requirement for analyses other than the "utilization analysis" (e.g., promotion and transfer analysis; separation analysis) could be effectively pursued, on a case-by-case basis, as part of the nondiscrimination enforcement program rather than as a condition precedent to the approval of any affirmative action compliance program. Routine reporting of basic employment data relating to applicant flow, selection, promotion, etc. (as distinquished from extensive self-analysis), along with the complaint process, could provide the compliance agency with a sufficient base to target investigations of suspect institutions.

In my view, a similarly dysfunctional situation exists with respect to the interface between current procedural requirements and the problems of developing an affirmative action compliance program addressed to the reality of the academic employment process. In this regard, current requirements impose unworkable time frames on the particularly complex program development process. Moreover, the fact that college and university contractors are not now routinely required to submit an affirmative action compliance program for

review and approval has unnecessarily contributed to the current confusion in this area. The approach taken by the current regulations—triggered as it is by preaward clearance requests and routine compliance checks on a sample basis—has failed to provide the ncesssary incentive to most institutions who view the current hit-and-miss approach as either unfair or avoidable, or both.

It has been our experience that the development of an acceptable affirmative action compliance plan is a time-consuming process (particularly with respect to those portions addressed to the academic employment process) which requires a close working relationship between the contractor and this Department, both from the standpoint of technical assistance and frequent evaluation of progress. Pursuant to current Department of Labor regulations, this time-consuming, interactive process is foreclosed by several requirements. The majority of higher education contractors are required to have completed already the development of an acceptable plan and, if not previously required, are required to develop and submit such an acceptable plan within 120 days of the commencement of their initial contract. With respect to contractors who have already received contracts, there is little latitude for current cooperative development toward perfecting a deficient affirmative action compliance program. With respect to future contractors, the time frame does not permit a successful effort in this regard.

Current Department of Labor regulations also provide little or no latitude in the imposition of sanctions upon a finding of current noncompliance, regardless of the current willingness of the contractor to eliminate all deficiencies within a reasonable period of time. Current requirements of 41 C.F.R. 60-2.2(c) require the dispatch of a show-cause letter immediately upon a finding that a contractor has an unacceptable affirmative action compliance program, regardless of the prospects of resolving the deficiencies through negotiation or conciliation. The need for time-consuming cooperative development is not currently regarded as "good cause" within the meaning of that provision. If on the 30th day of the show-cause period the contractor has not complied but is willing to comply as quickly as possible, current regulations force the process toward the imposition of severe sanctions. Even though 41 C.F.R. 60-1.26(a) permits the use of informal hearings (without the immediate specter of mandatory sanctions) and posthearing conciliation and negotiation, if appropriate, before the commencement of formal proceedings, 41 C.F.R. 60-2.2(c) prohibits the use of informal hearings to address affirmative action compliance program deficiencies and requires the use of formal proceedings. This is indeed a bizarre situation when one realizes that informal hearings are available as a procedure for employment discrimination cases but not for instances of affirmative action compliance program deficiency.

To summarize, our experience in carrying out responsibilities assigned to us under Executive Order 11246 as the compliance agency

for contractor institutions of higher education has revealed the following major problems with the requirements set forth in current regulations:

1. The issue of entry by minorities and women into the available pool of persons for employment is ignored by the current regulations, which place the entire thrust on the question of the proper distribution of persons already in the available pool.

2. The time frames for developing and reviewing affirmative action compliance programs provided by the current Department of Labor regulations are unworkable in light of the complex process of plan development faced by higher education institutions.

3. The fact that colleges and universities are not required routinely to submit plans has created confusion and has failed to provide the necessary incentive to develop plans before the initiation of a compliance review.

4. The interactive process of technical assistance and negotiations which is necessary to develop affirmative action plans in higher education institutions is foreclosed by the rigid show-cause and enforcement provisions of the current regulations. Moreover, current regulations provide little or no latitude in the imposition of sanctions upon a finding of noncompliance, regardless of the willingness of the contractor to eliminate all deficiencies within a reasonable period of time.

5. The current self-examination approach of the Department of Labor regulations reflected by the detailed analytic requirements outlined above is excessively burdensome to the institutions while at the same time rarely producing any real insight into academic employment decisions.

In light of the problems inherent in the application of current Department of Labor affirmative action regulations, I recommend that the Department of Labor consider several important changes in the current affirmative action approach to the academic employment aspects of institutions of higher education. The substantive changes would apply only to the area of academic employment and current DOL *substantive* requirements (41 C.F.R. 60–2) would continue to apply to the area of nonacademic employment. In contrast, proposed changes in the current *procedural* requirements would apply to all aspects of the plan.

Proposed Changes

1. Instead of the current ad hoc procedure for requesting the submission of affirmative action compliance programs, all contractors should be given a period of 180 days from the date of change in the applicable regulation to develop and submit an affirmative action compliance program for review by this Department. If no such

program is submitted by a contractor on or before such date, a show-cause letter must be issued consistent with present requirements.

2. Upon the submission of a proposed program by a contractor, the current 60-day evaluation requirements of Revised Order No. 14 should be altered to the more realistic position that the compliance agency shall analyze the submission as quickly as staff resources permit.

If on the basis of this analysis, the compliance agency determines that the initial submission is deficient, then instead of the immediate issuance of a show-cause letter as presently required by Revised Order No. 4, the contractor should be given written notice of the specific deficiencies and a revised submission should be requested within 60 days of the notice of deficiency. This period could be extended by the compliance agency if it concludes that technical assistance needs require or that the contractor has acted expeditiously in good faith to complete the revision but has been unable to do so within the 60-day period.

If a revised submission is not made within 60 days (or an agreed-upon period in excess of 60 days), a notice of proposed debarment (there being no purpose at this point in time to the issuance of a show-cause letter) would be issued.

Upon receiving the revised submission, the compliance agency would analyze the revision to determine its final acceptability. If the revised submission is determined to be unacceptable, at the discretion of the compliance agency, either a notice of proposed debarment would be issued forthwith (again, there being no purpose served by a show-cause letter) or an informal hearing first convened pursuant to 41 C.F.R. 60–1.26 (a) and such notice issued in the event of a favorable determination (41 C.F.R. 60–2.2(c) presently precludes the use of an informal hearing in this regard).

3. In order to provide an incentive for negotiation and voluntary compliance during any show-cause period, the regulations should be changed to permit an extension of the show-cause period, at the discretion of the compliance agency, if substantial progress is demonstrated by the contractor in developing a submission. If no submission is forthcoming during the show-cause period, then consistent with present requirements, a notice of proposed debarment would be issued and a formal hearing convened pursuant to 41 C.F.R. 60–1.26(b).

No sanctions should be imposed on any contractor for failure to submit an acceptable affirmative action compliance program until a decision of noncompliance has been reached pursuant to a formal hearing (41 C.F.R. 60–1.26(b)).

4. An affirmative action supply-side focus would be established by the requirement that the contractor examine, as an extension of the current utilization analysis components of 41 C.F.R. 60–2.11, whether the percentage of minorities and women in either or both the graduate or undergraduate student population of the institution significantly exceeds the percentage of minorities and women in the various

academic availability pools. If so, the contractor would be required to outline affirmative action efforts, underway or proposed, to contribute to the elimination of this disparity.

5. Current substantive requirements should be simplified to require indepth analysis only to the extent of a utilization analysis with respect to all positions for which a substantial recruitment effort is made outside the current work force of the contractor (as distinguished from promotion). This utilization analysis would be conducted by organizational units, but higher education institutions would be permitted to aggregate organizational units (on the basis of common administrative control or related discipline) for purposes of setting goals and establishing timetables. The regular reporting of basic data regarding all employment practices to facilitate the enforcement of nondiscrimination requirements would replace the current requirements for all statistical and indepth analyses (other than the utilization analysis) of 41 C.F.R. 60–2.23 from the affirmative action obligations, unless the compliance agency determined on the basis of available evidence of possible discrimination that a given analysis should be conducted as part of the affirmative action compliance program development.

The compliance agency should be permitted to delete the goals and timetables requirement where underutilization is not statistically significant *or* permit goals and timetables to be aggregated on a campus-wide basis.

I believe that the current uneasiness on many college campuses about the purpose and the desirablility of affirmative action employment programs is directly attributable to the dysfunction between the current regulations and the unique aspects of the academic employment setting. I believe that the changes outlined above, if accomplished, would revitalize the affirmative action concept for America's institutions of higher education.

I would like to conclude my remarks first by commending the Department of Labor for conducting these hearings on such a vitally important and complex subject and, second, by pledging the resources of this Department to assist in whatever way possible in this effort to improve the effectiveness of the current affirmative action requirements in securing equal employment opportunity for minorities and women.

MR. HOLMES. A strong commitment to affirmative action in employment is, in my view, essential. However, we must continually review and reassess the mechanisms we use to achieve that objective. In submitting Secretary Weinberger's statement, it was my hope that this and similar expert assemblies would start to focus attention on the problems which have arisen in applying the Department of Labor affirmative action regulations to college and university employment.

This is, in fact, the purpose of the Labor Department's recent inquiry. Various unofficial reports have touched upon these problems, most recently, the study published by the Carnegie Council on Policy Studies in Higher Education.

The statement submitted to the Labor Department in August by former Secretary Weinberger is based on practical experience and reflects the end product of a long process of evaluation by the Department of Health, Education, and Welfare. It seems to me at this juncture that the proposal set forth by the former Secretary and the recommendations made by the Carnegie Council merit serious consideration, not just by congressional committees and Government officials who share responsibility for the program but by all persons likely to be critically affected by the outcome.

Let me start by summarizing briefly the major substantive procedural requirements of Department of Labor regulations:

First, a utilization analysis for each job group within each organizational unit which compares the percentage of minorities and women in a contractor's work force with the percentage of minorities and women available in the labor market.

Second, for each job group where this comparison reveals a lower percentage of minorities and women in the contractor's work force, the establishment of goals and timetables to overcome such underutilization and analyses to determine whether for each job group within each department there has been an adverse impact on minorities and women in any of the following areas: recruitment, selection, placement or assignment, promotions, granting of tenure or job security, transfer, salary or compensation, provision for fringe benefits, availability and suitability for training, separation or termination.

In the event that any of the analyses in any of these areas reveals an adverse impact on women and minorities, a further indepth analysis of the specific factors which created the adverse impact must be undertaken. Having identified such factors, the contractor is required to develop an action-oriented program to overcome the adverse effects. If the factor causing the adverse effect is a test, defined as virtually any objective standard, the test must be validated pursuant to another set of Department of Labor regulations or its use discontinued. An affirmative action policy statement must also be developed and disseminated, and other miscellaneous actions must be outlined in an affirmative action program.

The major procedural requirements governing the development of these plans include the development by the contractor of an affirmative action compliance plan within 120 days after receiving a contract; the conduct by the compliance agency, in this case HEW, of both routine reviews of affirmative action programs and special preaward reviews whenever a contract in excess of $1 million is to be awarded to a given contractor; and the review by the compliance agency of the sufficiency

of affirmative action plans within a period of 60 days. In the case of preaward clearances, the compliance agency must evaluate the sufficiency of the plan within a period of 30 days.

The substantive standards for evaluating the plan are the same in both cases: the issuance of a show-cause letter to the contractor if the compliance agency determines that the plan is not acceptable, providing the contractor a 30-day period in which (1) to demonstrate that the contractor is actually in compliance (i.e., the initial determination of noncompliance was erroneous); (2) to perfect an affirmative action plan; or (3) to voluntarily negotiate an agreement specifying the action the contractor will take to perfect the plan.

In the case of the preaward review situation, this period is collapsed into a single, 30-day, preaward clearance time frame. Finally, the compliance agency must convene an administrative hearing if the contractor does not either successfully contest the finding of unacceptability, correct existing problems, or enter into an acceptable conciliation agreement to correct the deficiencies identified in the show-cause letter. It goes without saying that these provisions seem eminently fair and reasonable on the surface.

Our experience has been, however, that while the principle of affirmative action definitely should and must be pursued, the current regulatory framework has not worked well in an academic setting and holds out a greater promise to racial and ethnic minorities and women than can actually be delivered.

I will not take up the time of the conference to fully explore the extent to which the current requirements are in several respects incompatible with faculty employment conditions, market availability, and a compliance review program geared to reaching institutions on a broad scale. Those issues are discussed in former Secretary Weinberger's statement. However, I do want to reiterate his major conclusions.

First, the issue of entry by minorities and women into the available pool of persons for employment is largely ignored by the current regulations, which place the entire thrust on the question of the proper distribution of persons already in the available pool.

Second, the time frames for developing and reviewing affirmative action compliance programs provided by the current Department of Labor regulations are unworkable in light of the complex process of plan development faced by higher education institutions.

Third, the fact that colleges and universities are not required routinely to submit plans has created confusion and has failed to provide the necessary incentive to develop plans before the initiation of the compliance review. Even if plans were required to be routinely submitted, I say parenthetically, under the present substantive requirements, the agency review process would become impossible, overburdened.

Fourth, the interactive process of technical assistance and negotiations which is necessary to develop affirmative action plans for higher education institutions is foreclosed by the rigid show-cause and enforcement provisions of the current regulations.

Fifth, the current self-examination approach of the Department of Labor regulations, reflected by the detailed analytic requirements, is extremely burdensome to the institutions while, at the same time, rarely producing any insight into academic employment decisions.

On the basis of these conclusions, former Secretary Weinberger proposed a number of specific changes. Taken together, they would establish what we feel is an orderly, step-by-step approach to developing and reviewing affirmative action plans within realistic time frames. They would add an important supply-side focus to the development of the plan.

Simplified, the analytic requirements would provide for the regular reporting of employment data to facilitate enforcement of the nondiscrimination standards of the Executive order. Naturally, most elements of the proposal, which is currently under review, would necessitate amending the basic Department of Labor regulations. And at this stage it is unclear what the outcome is likely to be. The Labor Department has scheduled further public hearings and will ultimately decide the appropriateness of altering the regulatory scheme, since it is the primary policymaking agency with respect to Executive Order 11246.

However, what is now on the public record should help to stimulate a constructive dialogue, a dialogue that hopefully will move beyond the easy instinct to kick the Government in the teeth. In the meantime, we are determined to improve OCR's compliance review program and provide colleges and universities with more specific guidance.

As some of you may know, on August 25 the Department published in the *Federal Register* a recommended format for the development of an affirmative action plan by institutions of higher education. This format was prepared by the Department of Labor after consultation with HEW and should provide colleges and universities with helpful guidance in undertaking work force and utilization analyses, in determining availability, and in setting goals and timetables.

To some extent the format simplifies a number of the plan requirements I alluded to earlier. Moreover, by indicating that the problem areas identified by the analyses may be pursued in implementing the plan and are not required ingredients of the affirmative action plan itself, the format goes some distance towards resolving one of the major procedural difficulties mentioned in Mr. Weinberger's statement. With respect to the work force analysis, the format provides that each faculty or other instructional position must be presented by the Department under the subcategories of ladder-rank faculty, nonladder-rank instructional staff, and student teaching assistants. A sample work

force sheet is attached to the document published in the *Federal Register.*

The next step under the new format is the utilization analysis, and it is suggested that departments having similar disciplines should generally be combined or aggregated. Aggregations of departments should usually be based on factors of common administrative control, relatedness of academic disciplines, and female or minority ability in determining availability. The existence of accurate and current data remains a significant obstacle. But the format recommends a number of surveys and approaches which I think will be helpful.

Where underutilization exists and the increase in the number of persons in the job group necessary to eliminate underutilization is 0.5 persons or greater, each plan must contain goals which shall satisfy each of the following requirements: an ultimate goal for each job group stated as a percentage of the total employees in the work group and as a whole number representing the total minorities and women necessary to be employed to reach full utilization—interim goals whereby the institution projects rates of hiring and/or promoting minorities and women; these rates may be established for 3-year periods unless the expediency of high turnover and availability warrant the establishment of shorter term, interim goals because of small sizes of job units, slow rates of turnover, and difficulties in projecting trends in minority and female supply.

Timetables which reach beyond 6 years for realizing full utilization are not required for such job groups. The institution, however, must commit itself to an annual review and updating of goals and timetables. It is expected that as additional minorities and females come into the relevant labor market, the timetables will be shortened.

In all cases determination of availability and adequacy of goals must be reviewed annually. Each plan must contain specific and detailed, action-oriented programs, including recruitment and training programs which comply with Revised Order No. 4. Attached to the document which we have sent as a memorandum to college and university presidents are sample forms, as I mentioned, on which to prepare the work force analysis of faculty and noninstructional staff.

In sum, this package amounts to a clarification of a basic procedural requirement which should facilitate OCR review of affirmative action plans and encourage compliance.

At the turn of the year OCR initiated a long-range training and staff development program designed to upgrade investigative skills, enhance the comprehension of the statutes and regulations we enforce, develop and operate employment discrimination standards, and expedite the handling of pending Executive order complaints.

The second stage of the training program will deal with affirmative action standards and the compliance review requirements of the regulation. This training and policy development process will continue

through this fiscal year. We anticipate that at the conclusion, OCR will have firmly-rooted employment discrimination standards, which we do not presently have, and plan-review standards, which will be enforced uniformly by all regional offices, and that the backlog of discrimination complaints will be substantially reduced.

Employment discrimination training involving staff from all of our regional offices headquarters is on the job; that is, it is proceeding in the context of disposing of existing complaint cases. Simultaneously, OCR will proceed to review affirmative action plans. A first order of business is to follow through on the agreements which have been entered into with some 20 colleges and universities this last spring.

These agreements contain commitments to correct deficiencies in affirmative action plans. On the basis of the Department of Labor's recommended format, OCR will proceed to ensure that acceptable plans are received from all these institutions.

We will continue to conduct preaward reviews of pending contracts of $1 million or more. And we will continue to enforce the existing regulation in other respects such as the issuance of show-cause notices when reviews reveal deficiencies in affirmative action plans.

To those of you who have read the recent GAO report which alleged that HEW has made "minimal progress" in enforcing the Executive order, it is worth noting at this time that since the turn of the year, OCR has issued 20 show-cause orders to institutions of higher education where affirmative action plans were found to be inadequate and has initiated hearings against the first higher education institution.

In short, we have been moving as rapidly as possible to strengthen the compliance review and complaint investigation effort within the existing regulatory framework. On the one hand, we recognize that extensive delays have occurred in reviewing plans and complaints of discrimination.

We also recognize that inconsistencies have occurred among regional offices in enforcing guidelines and setting priorities. Of the 781 complaints submitted under the Executive order since 1969, 280 have been finally resolved. Of the 149 affirmative action plans requested before review, 33 have been accepted.

The intensive training and policy development plan is designed to upgrade staff skills and produce better procedures so OCR can improve upon its performance in the future.

Government bureaucracies are far from perfect as agents of reform. And OCR has made its share of mistakes in trying to cope with a complex set of requirements that seemed always in a state of flux.

On the other hand, it must be apparent by now that the problems we have faced in enforcing the program are in part the consequence of an overly complicated regimen that exposes both parties, the compliance agency and contract institutions, to an interminable bargaining and

discovery process revolving principally around threshold procedural issues.

The regulatory scheme is such that only a very few institutions can be expected to develop an acceptable affirmative action plan without close Federal supervision. This in turn places a heavy demand on the bureaucracy and raises high expectations as to its expertise.

The fact that it required approximately 30 to 50 personyears of the Government's time in dealing with the University of California at Berkeley campus to develop an acceptable plan cannot simply be tossed aside as a bureaucratic blunder or as a symptom of politics at work behind the scenes, although I know full well this is the general perception. The fact is that we must ask ourselves whether the end product of this endeavor is worth it in terms of broadening employment opportunities for minorities and women, for the time spent grappling with the procedural nexus was time not spent on other institutions and the backlog of affirmative action plans, complaints, and the overly-crowded docket of unfinished business. It is to be hoped that the newly-published format and the internal program underway will help expand compliance activity so we may anticipate far greater impact in future years.

Thank you, Mr. Chairman, for the opportunity to appear before the panel.

CHAIRMAN FLEMMING. Thank you very much, Mr. Holmes.

First of all, in terms of reacting to the presentation made by Mr. Holmes, I would like to recognize Dr. Mordeca Jane Pollock, coordinator of the compliance division, National Organization for Women.

RESPONSE OF MORDECA JANE POLLOCK

DR. POLLOCK. Thank you, Mr. Chairman, and distinguished members of the Commission. My name is Mordeca Jane Pollock. I am the university compliance coordinator for NOW. Being in the sex discrimination business, we run rather a large operation. I have a Ph.D. in French literature from Harvard University. I have been a member of the faculty at Brandeis University for 8 years. I teach French and French literature. I hold the rank of assistant professor.

Most important for our proceedings here is that I was in the unique position in 1973 to 1974 to be the affirmative action coordinator of that university and to devise the university's first revised plan for affirmative action, including availability, utilization, goals, timetables, and the rest; as the French would say, "the whole earth-quake."

My remarks will be addressed to the paper the members have before them, the paper of former Secretary Weinberger. My remarks are the result of a long process of evaluation by the National Organization for Women. And I must immediately say that we do not follow the easy instinct of kicking the Government in the teeth. We follow the justified

reaction of saying that the chief problem in affirmative action has been nonenforcement of Order No. 4 by the Office for Civil Rights of the Department of Health, Education, and Welfare.

I find it ironic that both in Mr. Holmes' presentation and in the paper of former Secretary Weinberger one-third of the paper is spent on outlining the regulations which HEW-OCR does not follow. And we have no assurance that it will follow them. All of us in sex discrimination organizations read with, I think, a feeling of encouragement and gratitude the Commission report dated 1975 and called *The Federal Civil Rights Enforcement Effort* (volume III). If you read pages 275 to 306 in volume III of the January 1975 Commission report, you read that HEW-OCR has not done its job in higher education affirmative action enforcement. And so I must say (and I regretfully have to leave the politeness of academic discourse for the first of several occasions, I'm afraid), when I hear somebody from HEW talk about affirmative action, I am reminded of the Watergate defendants piously defending law and order. It's just not sensible.

What has happened is that we are in the middle; we dumb women know that we are in the middle of a massive sidestep of the real problems in academic affirmative action and that what we are seeing is not Government enforcement but its permitting special pleading on the part of institutions of higher education.

Let's look at some of the arguments that we hear. If you go to the first No. 5, now look, HEW-OCR is very aware of the fact that any selection standard that has an adverse impact on women or minorities must be demonstrably proven necessary for a job.

Now, HEW talks about peer-group standards. Mr. Willie, Dr. Willie, yesterday showed us, demonstrated how dangerous relying on peer-group standards alone can be. I'm not going to go over that again. One of the peer-group standards that I hear the most about is "promise."

Senior members of the department get together and they evaluate the promise of the junior member. But "promise" is like the term "national security." Now, there is a valid national security interest, and I believe there is a valid standard of academic promise. But the words are used to hide more things than they are for anything else.

Now, peer-group standards, peer-group evaluation, cannot be the unique criterion for academic hiring. And HEW-OCR must step in on this. I will tell you why.

A very beloved and distinguished black feminist, who is my guru, my leader, and my role model, worked as a lawyer in EEOC for many years, was a freedom rider in the 1930s, has three law degrees, the highest, a doctorate of law from Yale, was turned down for graduate study by Harvard in 1944 because she was a woman. At Brandeis University we had a wonderful chance. This person was hired; there was a tenure evaluation, and the same person was turned down for tenure.

Do you know why? Because that person did not have a Ph.D. This was in the department of American civilization. Somehow, a black feminist with three law degrees, with elaborate experience in all kinds of civil rights law, could not be a professor of American civilization at a distinguished university because she did not have a Ph.D. So much for peer standards. Luckily we had an enlightened dean of faculty, who overturned the ruling of the committee and gave Brandeis one of its finest professors.

If you go to the second No. 5 of Secretary's Weinberger's paper, these are very encouraging words, I think you will all agree. The trouble is that up until the GAO report a few months ago, HEW did not take anybody to hearing, at least any of the higher education institutions. If even one of the number of "biggies" in the education field, the higher education field, had been taken to hearing, we would have at least gotten some spillover; but we got no spillover.

What happened instead was that, and I am going to change hats for a minute, the relative inaction of HEW-OCR has made of itself a notoriously paper tiger to the colleges and universities of this nation. So that when I was an affirmative action coordinator and, we at Brandeis, we met with representatives of HEW-OCR in charge of our plan, our university counsel said, "This one was the biggest pushover I have ever seen."

I think that HEW-OCR has demolished the credibility of the entire affirmative action program. And I am here to announce that NOW has sincere doubts about the affirmative action compliance program as currently instituted.

Let's focus on the other major argument that the former Secretary makes in his presentation: A lot of talk is given to the supply side. And, of course, if you read the arguments put out by opponents of numerical employment goals, they also emphasize the supply side.

The trouble is that (despite the remarks of my distinguished colleague) if you read those regulations, and at one time I knew them by heart, they have never placed a total emphasis on the demand side.

On the other hand, Order No. 4 specifically encourages you to look not only at those with the requirements (in this case, the required piece of paper) but at those capable of acquiring the expertise.

HEW had repeatedly ignored this, and now gets request after request saying, "Do you know of any research on the relationship between the Ph.D. requirements and college teaching?" "We don't know. If you do, tell us."

HEW has, however, accepted the Ph.D. standard despite the principle that if the criterion has an adverse effect on women and minorities, you have to validate it. HEW has not asked any of the universities to develop job-related qualifications. I say "job related." I want that underlined.

The other ironic thing—I can't tell you how stunned I am by the supply argument that we hear in the Weinberger paper, which was just repeated—HEW itself controls most of the supply that it accepts. Who the heck enforces or is supposed to enforce Title VI and Title IX?

You see where I am going? I think it was *Adams* v. *Richardson;* Iam not a lawyer. I know that a bunch of us feminist groups or "outside feminist agitators" got together and took former Secretary Weinberger to court. The civil rights enforcement, the Commission report, everybody tells us over and over again that HEW itself is responsible for the situation it is now criticizing.

For example, with regard to the supply situation, let's look at Title IX. I won't even bother to talk about the delay in issuing the implementing rights. In 1973 HEW-OCR conducted only eight Title IX reviews of the 2,700 institutions of higher learning that come under Title IX. (That is volume III of the *Federal Civil Rights Enforcement Effort—1974,* page 369.)

So, even if we accept the Ph.D. as a criterion, we have to place a lot of blame for the supposed unavailability of minority people and female people squarely in the lap of HEW-OCR. Now, the supply argument is vicious, and just because we are "dumb" women doesn't mean we know it isn't vicious.

The supply argument gets away from the real issue: Who has the power in academia for academic hiring? It is the senior members, the tenured members of several university departments. The power in academia is not everywhere and nowhere, like Pascal's "hidden god." We know where it lies.

So that what HEW does, has done, and what the former Secretary has done by focusing on supply is to sidestep the issue of who does the hiring and what type of hiring decisions are made, and what type of an archaic, unfair system has prevailed.

Now, this sidestepping is breathtaking. I can only admire it. But it is obfuscatory, dilatory, and if you are minority or female and looking for a job and you have to come up against this kind of discrimination, this sidestepping is not esthetically pleasing.

What has been going on, and what we are going to see in the Department of Labor hearings that have been continued (and that were sprung on women's groups in August), is that special pleading is going to be accepted for institutions of higher education. Somehow, we academics are morally superior to the rest of the world and, therefore, somehow, our criteria are so subtle that you can't touch them. You are violating the first principle of civil rights. You have got to challenge special pleading.

You have got to challenge these grounds of uniqueness. What has happened is that certain Ph.D.s have "done a number" on the public. Somehow, getting a Ph.D. is the equivalent of moral excellence, and so the professors who have been screaming against goals will benefit from

the same type of aura of morality that physicians benefit from those TV shows. And, of course, the malpractice awards get higher and higher.

What I am saying here, what I have been trying to say, is that special pleading must not be accepted on the part of institutions of higher education. It is the argument that, if you let one strand go, the whole net will go. Uniqueness and subjectivity must not be accepted on the part of higher education institutions. and we must demystify the hiring process of higher education institutions.

There is some good stuff in the HEW report. I agree that the analyzed data has to be simplified. The trouble is that I am unsure as to what is going to come out of the report. I think that NOW would favor the reporting of dynamic data--turnover, hiring, promotion—and that these should be included in one standardized reporting form for all sorts of people who have to deal with compliance agencies, because that was one of my chief headaches—having to fill out the same thing 15 ways.

HEW pleads for more discretion (Weinberger paper). The problem, for a person like myself, and I think for many other civil rights advocates, is that HEW has not applied its discretion in the past. It has not applied its discretion to enforce Order No. 4. Yet, it pleads for more discretion. I think this pleading is incredibly ironic. I think it comes from the head of an agency, the dilly-dallying of which amounts to the abuse of discretion, and therefore, I am going to have to say something not nice, unacademic, about HEW-OCR. I am put in mind of the old religious song, "Which Side Are You On?" Thank you.

CHAIRMAN FLEMMING. Thank you very much. At this point we will be happy to get Mr. Taylor's reaction.

RESPONSE OF WILLIAM TAYLOR

MR. TAYLOR. Thank you, Mr. Chairman and members of the Commission. Thank you for your kind words.

I guess the one thing that there is some agreement on is that the present implementation of policy by HEW and/or the Department of Labor is unsatisfactory and that there have to be new thrusts and new directions. As someone who approaches this as an interested observer, rather than as in some other fields involved on a day-to-day basis, one of the perplexing things is that here you have a program which the Commission reports have demonstrated has yielded very little in the way of tangible, measurable results.

The question, of course, is: What are the directions? And one of the things that troubled me a little bit in Mr. Weinberger's paper and was repeated by Mr. Holmes is the general suggestion that there is something quite different about academic employment, in terms of regulation and prohibition of discrimination, from other types of employment.

Now, that is asserted very frequently. It is asserted very frequently that the colleges and universities are institutions that are so different in character from businesses or Government agencies or other institutions that the rules for redressing race discrimination and sex discrimination that may be usefully applied in the latter area cannot somehow be usefully applied to the institutions of higher education.

I would not want to suggest that no material differences exist. But I think it is of great importance that blanket assertions that the colleges and universities are different or unique not be accepted uncritically and that the asserted differences be examined specifically and with a great deal of care to determine what their implications are for equal employment efforts.

It is also important to examine the similarities as well as the differences. And one very important similarity, so far as I'm concerned, is that colleges and universities share with industry and Government a history of past discrimination based on race and sex that is really part of the shameful heritage of every American institution.

And so, while the implication of that is that colleges and universities share with these other institutions a very difficult job of overcoming the effects of many years of exclusion, that is a job that cannot be accomplished easily or without specific and affirmative efforts.

I think part of the problem is that somehow people don't really believe that affirmative action is applicable to colleges and universities. They say they believe it, but somehow they do not really believe it. And I think if that is the underlying issue, we have got to bring that to the surface and have the discussion of it and either reaffirm, which I believe we should do, the basic requirements of affirmative action, the basic requirements of setting goals, or else say we are going on to something else.

This kind of halfway, in-between posture that we are in right now I don't think is at all satisfactory. As a number of people have said, an important compensating factor is that colleges and universities have direct control over the instrumentalities for qualification; they control access, and therefore they don't have to rely to the same degree that other people do on the cooperation of other institutions in order to achieve a goal.

I guess maybe I am more ingenuous than Dr. Pollock, but I was pleased to see the emphasis given by HEW to the needs and policies of the supply side, as it is called, if that will result in increasing the number of minorities in the undergraduate and graduate programs leading to academic employment.

But having said that, I guess I also have to make exactly the same observation Dr. Pollock did, pointing out that this is hardly a new concept and the tools are hardly limited to the Executive order.

Since 1964 we have had Title VI prohibiting race discrimination in Government-funded programs. Since 1972 we have had Title IX.

These are tools which are available to HEW. In fact, as I understand it, they cover a good deal more because the number of universities that have grants and Federal beneficiaries cover almost the whole field, whereas contracts is a more limited area.

So I would share the skepticism that somehow we have discovered a new concept here, and we are going to work on the supply side under the Executive order. As Mr. Holmes knows, I continue to be extraordinarily concerned about a Federal law being, in effect, rendered null and void by the failure to use the enforcement process, except under court order or court direction.

So that it would be wonderful if this means that now Title VI and Title IX are going to be used in a very affirmative and forceful way to increase the number of people available on the supply side.

Again, I share with Dr. Pollock the view that simplification of utilization analysis may be a desirable initiative. To the extent that the analysis itself has seemed to become the goal rather than the practical results that are supposed to flow from the analysis, I think that there is something wrong with policy.

And if the analysis can be simplified in ways that do not take away from the basic requirements, if more emphasis can be placed on the practical steps that have to be taken, the efforts that have to be made to recruit affirmatively and to find the sources of candidates for particular positions, then it seems to me that would be worthwhile.

But I would like to see that kind of emphasis. I would like to see an equal emphasis on that, at the same time that there is a simplification of the analysis requirements. On the question on time frames and the development of plans, I would not quarrel at all with the statements made in the former Secretary's comments that the time frames of 30 to 60 days seem to be unrealistic.

But again, I get perplexed because I hear that, and then I read the Commission's report, and the Commission's report says that the time frames have meant almost nothing over the past 4 or 5 years in conducting reviews of universities, that they have not really even been good guideposts because the reviews have been conducted ad infinitum. And you are left with a sense of perplexity again.

I think that what has to be done is that a judgment has to be made of setting a realistic time frame. I don't believe that any institution or agency can operate without deadlines and goals of its own.

Having been involved in cases where HEW has been investigating for 5 or 6 years without coming to a conclusion—concluding or deciding that a plan is satisfactory or that compliance has been achieved—I would be satisfied if I saw realistic time frames being set and then met or met with some degree of what we said was reasonable. If they got within a couple of months, it would be all right.

But it comes back to the question of whether there really is a policy here that people do believe in. I think it is no great secret that the

former Secretary, Mr. Weinberger, did not believe in such a policy and he said as much in his farewell address. It was not simply a matter of undue bureaucracy being imposed by the Department of Labor.

He appeared not to believe that the concepts of merit and quality were reconcilable at all. That was the thrust of his remarks. That being the case, I don't think it is terribly surprising that you had the situation you had.

I would look—since hope springs eternal and since we now have a Secretary who knows the academic world—I would look for an articulation of his views on the subject, on the basic policy issues. Then I think we will know a lot better where we stand. Until we have that articulation and know what he believes and how he believes the law would be better enforced, I think we are going to be struggling with a lot of quibbles or quarrels about things that may be very important to implementation but not know whether we have anybody who really believes in the basic policy. Thank you.

DISCUSSION

CHAIRMAN FLEMMING. For the benefit of those who are here and listened to the presentation, to the questioning, and so on, I would like to say that because of the fact that some problems have arisen relative to Commissioners' time schedules, that I am endeavoring to work things out so that the panel which is scheduled to start at 1:30 will start at 11:30 and then we will see just when we will have a break for lunch. The objective will be to start the 1:30 panel at 11:30.

All right. I would now like to recognize Vice Chairman Horn for any questions that he may want to address to the members of the panel.

VICE CHAIRMAN HORN. Mr. Holmes, I gather from your testimony and the implications in Secretary Weinberger's statement that there is a recognition that the Federal Government ought to be coordinating, on a national basis, the statistics relative to the supply data for the various fields that exist within American colleges and universities.

MR. HOLMES. Yes, I think that is correct on your part, Commissioner Horn. That area, the whole area of data availability has been one that has been quite frankly difficult to resolve. The data available has been very, very soft. The best data is in the area of sex. The least reliable data is in the area of race.

VICE CHAIRMAN HORN. Could you indicate when that program might be implemented?

MR. HOLMES. There have been discussions between HEW and Labor. I think also between Labor and EEOC. Now, there is a new EEOC form going out, the EEO-6, that may have been referred to yesterday, which will provide helpful data and is one that is going to be utilized by all three agencies. So the issue of coordinating is central

That would yield data on an annual basis. I think there is still much work that has to be done in terms of past data and that a great deal of coordination remains there.

VICE CHAIRMAN HORN. Do you think that will be implemented by June 1976?

MR. HOLMES. It would be very difficult for me to say. Let me relate the experience of our agency. We put out an RFP [request for proposals] 9 or 10 months ago to receive bids by proposals, by contractors for the Office for Civil Rights in the higher education area. And we were not able to find at that time any contractor, I regret to say, that had the capability of conducting the type of data analysis, data collection analysis, that we felt was necessary.

Now I cannot say what the time frame is going to be, Mr. Horn. Was this testimony received from Mr. Travers yesterday?

VICE CHAIRMAN HORN. No. He agreed that this was something that ought to be done. I suggested, based on my own experience, that with the methods of reporting available that this should not be that difficult.

MR. HOLMES. As I indicated, this is an area we have discussed with the Labor Department. They understand the need for the information. They do have their own agency, BLS—the Bureau of Labor Statistics—and we have ours, and this is the mechanism to use to obtain much of this data.

VICE CHAIRMAN HORN. If we could get the supply data, do you think it would be helpful if HEW would design perhaps various alternative computer software programs, so that 3,000 colleges and universities in this county could take the data requirements of your August 1975 memorandum and begin to process the work force analysis in relation to some of the supply data that might be furnished to come up with some common, systemized plan? What concerns me is that the American colleges and universities have about 3,000 ways to reinvent the wheel in this area.

It seems to me that much of what is being required under affirmative action programs is simply good personnel practice. But, on the other hand, the American colleges and universities have been understaffed—especially the smaller liberal art colleges—to get at this in some statistically sensible way.

Let me give you an example. I represent the largest university in California, and yet there are requirements in the State budget that we could not spend more than, say, $10,000 up until this fiscal year on developing a computer program without the approval of practically everyone but the Governor of California.

Now, those types of inhibitions on public universities, let alone the lack of resources in many private colleges, create a problem. And it seems to me the Federal Government could aid this group by furnishing computer software that would process the data and would provide an easier comparability in reviewing whether the plan was

acceptable because there would be a certain standardization of categories and inputs.

What is your reaction?

MR. HOLMES. I think it is something I can very positively react to. This issue has been of great concern to us.

For example, in our dealings with the University of California at Berkeley we found that within the university system they did have a computer program, particularly on the nonacademic side. That was a rather sophisticated program. In subsequent dealings with other universities and institutions, we will be working with the software system. But on the national scale I think this is something that can be seriously considered.

COMMISSIONER FREEMAN. Mr. Holmes, I would like to pursue the questions that have been raised by Dr. Pollock and Mr. Taylor as they relate to supply and particularly as they relate to what it seems to me are the responsibilities of HEW with respect to Title VI.

I am at a loss to understand the difficulties of HEW with respect to supply if it is at all complying with or enforcing Title VI. In that regard I would like to ask the question concerning the contract document.

Those documents that I have seen of Federal agencies include the provision of nondiscrimination. They include the requirement for affirmative action. And they also have a provision with respect to the requirements to comply with Title VI.

Now, apparently one division does not speak to the other, or one person who reviews one section of a contract does not speak to the person who reviews the other section of the contract. And this seems to me to be a basic failure of coordination.

Now, I would like to know if you could suggest ways in which perhaps this Commission could help HEW, in addition to the report which we have just released. Now, if the supply reflects the lack of enforcement of Title VI and the Executive order is not enforced, then those two together would mean there never will be any change from where we are today.

MR. HOLMES. Well, let me respond, Ms. Freeman. The issue of the supply side was raised in Secretary Weinberger's statement, and it is raised by our office. From the standpoint of affirmative action plans and in the context of contractual institutions, we have got 1,000, or approximately 1,000, higher education institutions in the country that have an obligation to develop an affirmative action plan.

But what we are proposing here is that in connection with the affirmative action program developed by a contractor institution, pursuant to the Executive order requirements of the Department of Labor, that an institution should be encouraged to include a supply-side focus. It is in a unique position to increase supply where there is a lack of availability and, where there is underutilization, to incorporate in their affirmative action programs a supply-side analysis.

Now, Secretary Weinberger noted in his statement some of the steps that could be taken. There is a Title VI obligation in part. But there is a distinction between the discrimination program and the affirmative action program.

If we can show discrimination with regard to higher educational institutions under Title VI and Title IX, then we can seek corrective action. If we cannot show discrimination, that does not mean the institution could be precluded from taking some affirmative steps, for example, broadening recruitment as part of its affirmative action employment program, and that is why we raised it in this context.

COMMISSIONER FREEMAN. What I'm asking is: Does not HEW also have the responsibility independently of the Executive order to see to it that the Title VI requirements are met?

MR. HOLMES. Yes, under Title VI and IX we conduct reviews in higher education to ensure there is nondiscrimination.

COMMISSIONER FREEMAN. What does that review consist of?

MR. HOLMES. It depends on the nature of the complaint or review. I mean, if you want to go into the details of the eight States

COMMISSIONER FREEMAN. Does it have to be a complaint?

MR. HOLMES. No, of course not. It does not have to be a complaint. By and large, outside of those eight States that we are presently dealing with on the higher education segregation issue, the higher education Title VI and Title IX enforcement program, the priorities for it are dictated on the basis of the existence of compliance information.

COMMISSIONER FREEMAN. So it is complaint oriented?

MR. HOLMES. Not entirely. It is a complaint orientation, yes, to respond to your question. But you do not need a complaint to take action. If we identify a problem through the review of higher education data submitted to us, we will initiate a review. Does that respond?

COMMISSIONER FREEMAN. Thank you. Well, could you state for us how many reviews were initiated by HEW without any complaint under Title VI?

MR. HOLMES. I can provide that information to you. I don't have it today. I would be glad to do that. Again, I can say that in the higher education area, and I am staying in that area, there are eight States with which we have been involved in negotiations for the last year and a half under the *Adams* v. *Richardson* decision where we are dealing with the issue of discrimination in the higher education systems and that has been the primary focus of our higher education student services program for the last year and a half.

COMMISSIONER FREEMAN. You referred to several Southern States. The discrimination is nationwide.

MR. HOLMES. I understand.

COMMISSIONER FREEMAN. Does HEW recognize that it has a responsibility to initiate a review for Title VI compliance in States other than the South?

MR. HOLMES. Yes, of course. And we do. But the primary initiatives in this area have been in the eight Southern States responding to the court order in *Adams* v. *Richardson*. We do conduct reviews of higher education nationwide. But outside of those eight States, it is primarily a complaint orientation in the higher education area, reacting to and following up on complaints received by us.

COMMISSIONER FREEMAN. I indicated at the outset that it seemed to me that the two together—failure of HEW to initiate any reviews for compliance with Title VI, compounded by ineffective compliance with the Executive order—put us in a situation where it will take another 2,000 years before any change is made.

MR. HOLMES. Ms. Freeman, I think we are talking somewhat at cross-purposes here. We are talking about basic nondiscrimination programs under Title VI and Title IX: a program that will require us to determine discrimination as opposed to affirmative action programs under the Executive order, where certain obligations, regardless of the evidence of discrimination, attach to the contractor as a condition of the institution's receipt of the Federal money.

Under that program one of the recommendations that was made to the Labor Department was that there should be a supply-side emphasis as part of their affirmative action employment programs.

COMMISSIONER FREEMAN. That is just the point. If there is little supply in the marketplace because of discrimination in violation of Title VI, you never will change; there never will be effective affirmative action.

MR. HOLMES. My point is that you approach an institution under Title VI or Title IX on a discrimination review. You may not be able to obtain the evidence showing discrimination by that institution. And let's say, for example, that we were not—that institution would, nonetheless, have some affirmative action obligation on the supply-side in the context of its affirmative action employment program. And that is the point I am trying to make.

COMMISSIONER FREEMAN. May I just urge that HEW review its responsibilities to enforce Title VI and Title IX.

VICE CHAIRMAN HORN. As I understand this discussion, Mr. Holmes, you are making the point that there are questions of proof under Title VI and Title IX which you would have to prove discrimination, but regardless of that fact HEW does realize that with the supply side under affirmative action, they can require a university to come forth with a program which will help remedy the supply problems regardless of whether discrimination had ever been proved in the context of Title VI and Title IX.

So, presumably, you are making under your policy a positive contribution to the supply side, and it goes beyond what the requirements of Title VI and Title IX are?

MR. HOLMES. That's correct.

COMMISSIONER SALTZMAN. I have a point of clarification, Mr. Holmes, if I may. I think you are suggesting that those timetables are counterproductive?

MR. HOLMES. No.

COMMISSIONER SALTZMAN. I'm sorry. So you see goals and timetables as a valuable part of the overall affirmative action program?

MR. HOLMES. I see goals and timetables as a very important part of the affirmative action program. The recent format that was issued by the Department of Labor underscores the importance attached to goals in that the primary thing required in terms of detailed and statistical analysis in connection with an affirmative action program is the utilization analysis, which results in the establishment of goals in the event underutilization is identified.

COMMISSIONER SALTZMAN. I thought you had a *caveat* in there in your presentation. Maybe I didn't hear you.

MR. HOLMES. No, not with regard to goals and timetables. I did express concern in my statement regarding the numerous other analytical requirements. And that is what Dr. Pollock and Mr. Taylor referred to here as well, beyond the goal setting, processes that have heretofore been required ingredients of every higher education institution affirmative action plan and have resulted in what is admittedly a bureaucratic mess and a constant threshold problem with higher education institutions.

So that we feel as though once they have done all the analysis you have accomplished this objective, and you find out that the results to flow from the analyses are not as substantial as all our expectations had previously been.

So, it seems to me if we can simplify the analytical requirements for the institution—Mr. Taylor talks about sticking by the time frames. It is extremely important, I think, to stick by the time frames. And, in order to stick by the time frames you have to have substantive requirements that are possible to administer within set time frames. So, we are talking about a simplification of the substantive requirements and hopefully a simplification or the establishment of more reasonable time frames with which to deal with higher education institutions.

COMMISSIONER SALTZMAN. In line with some of the former Secretary's more philosophical points of view about equality at the analysis level, how would you judge the success of what we are doing relative to the equality of opportunity or the equality of result?

MR. HOLMES. The Executive order talks in terms of results, action-oriented programs with results as objectives. That is one of the purposes of setting the goals and timetables, to determine what the underutilization is. By the same token the results do not become the be-all and end-all because it may be that the goals may not have been attained for some legitimate reason, even though the institution has applied every good-faith effort to reach those goals. So, if the results

have not been met, the goals, over a period of time, then you look at the process, and you do not immediately declare the institution out of compliance because the goals have not been met or the results have not been met.

COMMISSIONER SALTZMAN. Dr. Pollock, in the pressure of producing equality of results, is there the danger of transforming goals into quotas?

DR. POLLOCK. I will refer you to my editorial in the *New York Times* on March 4, 1975, where I discuss the entire issue of academic quotas. I think there are two very simple points to be made—that if you have bad administrators and ill-willed members in the department, then goals are perceived as quotas. And if numerical employment goals are administered soundly and are based on realistic data (availability data) and are presented in a nonbullying manner, then they are not properly perceived as quotas because they are not.

Numerical employment goals only are perceived as quotas and only are acted upon as quotas when there is sloppy administration and ill-willed tenured faculty. And I say that knowing full well that a number of persons in the audience who are very distinguished and respected colleagues of mine take another point of view.

COMMISSIONER SALTZMAN. Frankly, my own approach is that we have to put this clearly on the table and examine it. I am not fearful of the divisiveness, but rather the divisiveness comes from a failure of adequate communication. Now, let me—and without impugning any motives, of course—but let me put to you the question, Dr. Pollock, that Miss Patricia Harris said yesterday: That, for a short period of time at least, preferential treatment is a prerequisite in the process that we are engaged in. Would you agree with the use of that particular concept at this time?

DR. POLLOCK. I think Attorney Harris' arguments were very refined on this point. She said, let us establish a baseline and let us establish, and she used (I think she pulled a number out of the hat) 80 percent, and she said you had *X* number of applicants for the job, one of whom, for example, is a minority person (I would say one is a female person) who scores 80, and then you might have two applicants who score 90, but who happen to be white males, who are the protected class in this society.

If there is a history in that department of prior underutilization of that particular group, in that case the baseline justifies and legitimates the hiring of a minority or female person. But, I think it would be—I think you all agree that we would be very mistaken not to understand the ifs and the conditions in which her logic was couched. I agree with her. NOW agrees with her. There are some other points that were raised yesterday also.

COMMISSIONER SALTZMAN. With respect to the underutilization, perhaps we ought to focus on the impact on Jewish academia, if you

will; the achievement, the parity of results, I assume requires some kind of recognition of a population parity. That is, you know Jews produce an enormous amount of academics. Will this mean that the number of Jewish academics is going to have to be constricted; will there be a reverse process of discrimination pointed at the Jewish community?

DR. POLLOCK. Well, sir, I am sure you are aware that one-half of all Jews are female.

COMMISSIONER SALTZMAN. I want to ask you questions about that too.

DR. POLLOCK. And, I must say, you know there are black Jews. I am sure you know that too.

COMMISSIONER SALTZMAN. Yes. Can you answer the question?

DR. POLLOCK. That was the answer. The answer is, No. An affirmative action plan is an exercise in arithmetic. You subtract; you take "what you got" in utilization from what you should have, your availability, and you subtract one from the other, and you should get something like what I would like my university to hire in the next 10 years. And the availability statistics, what you are choosing from, is your entire Ph.D. pool. So that if anything, Jews—both male and female—benefit from affirmative action. With regard to academic credentials, we happen to be a privileged minority. So in a sense I would say that members of the Jewish community should be 110 percent behind numerical employment goals because we are more representative in the availability pool from which universities set their guidelines.

COMMISSIONER SALTZMAN. What do you mean by "a privileged community"?

DR. POLLOCK. Insofar as, if you look at the educational statistics for American Jews, you find that over 80 percent of American Jews go to institutions of higher education; this is different from the rest of the population—that we are certainly numerically, statistically overrepresented, and yet we have maybe 10, 11, 12, or 20 percent in some of the Ph.D. pools.

COMMISSIONER SALTZMAN. Are you implying there ought to be less Jewish Ph.D.s?

DR. POLLOCK. I would never imply that.

COMMISSIONER SALTZMAN. Let me go on, if I may, and ask you: Have you looked at Thomas Sowell's paper?

DR. POLLOCK. Very briefly.

COMMISSIONER SALTZMAN. I would like to ask you about that. I would like to ask you about a few sentences here. But his statement says, in short, "Many of the statistical differences between the broad categories between men and women are to a large extent simply differences between married women and all other persons."

His point is that a single woman in a similar position to a man is similarly paid and does not suffer the same type of impact on salary that

a married women does. In other words, that there is not the same adverse impact as on a married woman; that you could categorize a single woman in a career or profession along with a man.

DR. POLLOCK. If I understand your question, and I may not, so please correct me I preface this by saying I have some trouble with the footnotes, and I would have to do some research on the paper's veracity. Are you saying that single people should be, single women should be paid equal to men, and married women should not?

COMMISSIONER SALTZMAN. He is saying that single women make relatively the same amount as men in the same category. That is what he is saying—that there is really no adverse discriminatory impact upon single women in the job market. I think that is what he is saying.

DR. POLLOCK. I don't think it is. Would you say that again?

COMMISSIONER SALTZMAN. Let me read the paragraph.

> Even the comprehensive studies by Helen S. Astin and Alan E. Bayer make the fatal mistake of holding marital status constant in comparing male-female career differences. But marriage has opposite effects on the careers of male and female academics, advancing the man professionally and retarding the woman's progress. Not only do the men and women themselves say so, the Astin-Bayer data (and other data) also show it. Therefore, to treat as "discrimination" all residual differences for men and women of the same characteristics, including marriage, is completely invalid and misleading.

Then in the next paragraph he continues in that vein.

DR. POLLOCK. It is not completely invalid. And, again, if marriage has opposite effects on men and women in the work force, it is because there exists in institutions of higher education, or there existed until very recently, something called antinepotism regulations. These regulations, as you know, legislate against the hiring of immediate members of the same family. If there is an adverse effect on women, *if* there is, it is also because we do the childbearing and often the childrearing. And yet, universities have made no provision for part-time employment on the tenure ladder, so that I think being married is not insignificant. By framing the question of marriage according to salary, you sidestep the gut issue. And there is some prodigious sidestepping going on. That is the way I look at it.

You know, it is a "when did you stop beating your husband" type of question. If you start from that premise, you are going to get that conclusion. But ask the question another way: Should marriage have an opposite effect; should there be informal or formal nepotism rules in universities?

There is often an unconscious attitude on the part of some of our best-intentioned colleges; I saw it myself in graduate school. It does not exist in my own department at Brandeis—that women married will somehow drop out if she is a graduate student. Those are the questions

to ask. And that is a way to get some sort of a sensible answer, to look at those questions. That is about the best I can do, sir.

COMMISSIONER SALTZMAN. I appreciate what you are saying.

Mr. Holmes, I have one question, if I may. I don't mean it to be embarrassing. But I assume that you have read the Commission's report number 3 [*To Ensure Equal Educational Opportunity*] and the Commission's claim that OCR has not adequately functioned in this area to pursue both ends of the spectrum. As Commissioner Freeman has pointed out, the supply is critical to the achievement of any success in the affirmative action area. Can you respond to that, those pages in that report?

MR. HOLMES. I would have differences of opinion on specifics. But I would agree with the general conclusion.

CHAIRMAN FLEMMING. It seems to me this has been a very helpful dialogue in identifying some basic issues. I try to keep in mind all the time that what we are dealing with here is a constitutional issue, an issue of constitutional rights. I read the General Accounting Office report, and I appreciate that undoubtedly those who are identified in the report can produce some rebuttal arguments. But the thing I am interested in is the thrust of that report. I read the Carnegie Council report in terms of the thrust of it.

And, as you have indicated, at the Commission we conducted an investigation and have developed a factual record and then on the basis of that have drawn some findings and have made some recommendations. But we are dealing essentially here with two institutions in our society on which we have to place great reliance if the rights set forth in the Constitution are to become meaningful in the lives of individuals.

In this area, as in other civil rights areas, we have gone through a period where people have crusaded for legislation; and by and large those crusades have resulted in very good legislation. Persons have exercised their right to go to the courts. And by and large we have had some very fine decisions from the courts. We are now at the point where, as a society, we are trying to implement legislation and implement court decisions in the interest of assuring persons the rights that they are guaranteed under the Constitution.

This is the point where we are disturbing the status quo. Because we are disturbing the status quo, some who were with us in the legislative period, some who conceivably were involved in court action, tend to drop out because they don't want to face the implications of the disturbance to the status quo.

At the Commission we have conducted oversight investigations, issued oversight reports, as I have indicated, on the Federal Government's role. It is clear to those who have read the reports that we are very concerned and that we feel that the failure on the part of the Federal Government to move in to implement laws and court decisions in an aggressive manner presents us with a very serious problem.

But, as I read the reports—and I really address this to the panel as a whole— I get the feeling at least that there is a deep-seated commitment in the educational community to implement these constitutional rights and to exercise leadership designed to implement these constitutional rights. If that is a correct feeling, and like all generalizations it is obviously subject to exception, but if that is a correct feeling, what do you feel can be done to correct that situation? I am convinced that a lot of the hassling that goes on between the educational institutions and the Government could be reduced immeasurably and that the whole process could be simplified if the educational community and the Government were both determined to open up opportunities for women and for minorities, contrary to the policies that have been followed in the past.

I appreciate that there is not any one simple answer to it and so on. But, Mr. Taylor talked about affirmative action. And, as I see it, the evolution of affirmative action has simply been an evolution designed to introduce due process into this whole area so that people can not act one way or another in an arbitrary or capricious manner, but that they have to act on the basis of facts and a careful analysis of those facts.

Is the opposition to effective affirmative action, as Mr. Taylor indicates, an opposition to the way in which it is administered; or is it really opposition to the basic underlying concept and basic objective of guaranteeing the rights of women and minorities?

I would be glad to have any one member of the panel pick up on that point.

MR. TAYLOR. I am tempted just to say, Amen. I just think a large part of the opposition is predicated on opposition to the goal rather than irritation with particular points of methodology. We are drowned in words—"equality of opportunity" versus "equality of results." And I again get perplexed and bewildered at those kinds of semantic discussions when I think everybody in this room would concede that we are so far from equality of opportunity as not to even approach the issue of equality of results.

I think what we are talking about—to get involved in the semantics a little bit further—is genuine equality of opportunity versus some kind of paper promise. And I think that what has been happening in the country as a whole is that people now are beginning to say, "You have got the paper promise and the other part of it is just a slow matter of evolution and time. What are you all upset about?"

And I think because of that we are at a very critical point. I think it is a shame to see the university community as a whole feeling so threatened by the rest of the world, by the complexity of the rest of the world, and by some of the various kinds of things that occurred in the 1960s, that they want to withdraw from it entirely rather than provide leadership.

I don't know what the answer to that is. But I think it puts the burden on people who are in that community and feel differently to speak out more loudly and more strongly than they ever have before.

DR. POLLOCK. I have a number of things to say. Mr. Chairman, I must regretfully say some political things; not regretfully, actually.

I think what the affirmative action program has done is to create another layer of powerless bureaucracy, both within the institutions of higher education and among the "Feds," as we say. I think that, whether or not this is intentional, in effect what has happened in affirmative action in higher education is that the Strangelove phenomenon has set in.

The Strangelove phenomenon is when you become so involved in the instrumentalities of what you are doing, you lose sight of the goal. The effect of HEW-OCR, of the inaction, has been to deflect the range of minority people away from the oppressors, away from the discriminators, through certain agencies of the Federal Government.

I myself, and I believe I speak or I know I speak for the National Organization for Women, believe this is continent with a current and ongoing Federal executive policy of promises to the powerless but protection for the privileged. I see the solution as political.

I think there have been delays in affirmative action because of Government policy, Government inaction. I think we are profoundly racist and sexist in nature in our society. I think that is a problem too. But again the solution is political. The solution is breaking through the current administration, the executive logjam, and also very much the solution is in higher education because unless we break down the racism and sexism in our institutions of higher education, unless we provide role models for young people like the brilliant professor of economics who happens to be a woman and the brilliant professor of American civilization who happens to be black, unless we provide leadership in higher education, unless we provide the training for those people who are going to come and lead this nation, then we are going to perpetuate the racism and sexism. So it is intertwined.

CHAIRMAN FLEMMING. Peter, do you want to make a comment?

MR. HOLMES. Yes, I will be brief. Let me say that in the area of civil rights—I find it happening to myself as well—there is a tendency to speak in generalizations, gross generalizations in many respects.

I don't know that we can say that higher education is withdrawing from the fray—that there is a lack of interest in affirmative action or commitment to affirmative action on the part of higher education institutions, Jewish organizations, or others who have questioned the methodologies that are currently in use to achieve the goal, and the goal has remaind elusive not just as the result of lack of effort or interest or commitment on the part of the Office for Civil Rights of HEW.

I think we have heard today that the methodologies, analytical requirements, have come to the point that it is the Strangelove phenomenon that has become sort of the be-all and end-all of affirmative action. I think we have to review it and reassess ways and means we are implementing and carrying through, reaching for the achievement of the objectives that we have.

I want to say again that I appreciate the fact that the Civil Rights Commission is utilizing its prestige and good offices to focus critical attention on this very important issue because I think it is one that has to be discussed. And I appreciate the opportunity again to be here.

CHAIRMAN FLEMMING. Let me ask you this question. You probably have had more experience as a Government official in dealing with a cross section of educational institutions on this issue than almost anyone else.

On the basis of your person-to-person contacts with the representatives of the educational institutions, I gather from your last comments that you have identified a good many instances where in your judgment there is a strong commitment to the concept of people in employment opportunities for minorities and women. You have been in the situation where you get the feeling they really want to move forward and that it is simply a question of the best method possible to use at a given time.

If you were making a rough statement of all of those that you have contacted, what percentage do you think represented educational communities that have crossed the bridge and have said, "We are going to do everything we can to correct the discrimination of the past"?

MR. HOLMES. I cannot begin to give you even rough precentages, but I think it is a substantial number. Look at the Carnegie Council report. That is not, in my view, what I would describe as an anti-affirmative-action document. It is a document that is interested in the ways that we are going to achieve affirmative action, representing a strong commitment, and that is rather representative of higher education.

CHAIRMAN FLEMMING. That report was very critical of the higher education community.

MR. HOLMES. It certainly was; that's correct. But it was a part of higher education demonstrating its commitment to the principle of affirmative action.

I think there is somebody else at the Commission you ought to talk to, a former Chairman, and the president of a very distinguished university in this country who has got—I have received some communications from him regarding the procedures that have been followed in the enforcement program which I cannot characterize as particularly supportive methodologies we are presently using. But I do not question for a minute his very strong commitment.

VICE CHAIRMAN HORN. Mr. Holmes, one of the concerns I have as a university administrator is that when you find incompetency in the

nontenured ranks or, let's say, you have disciplinary problems in the tenured ranks, most universities have a process that goes something like this: You have written grievance procedures; you have written disciplinary procedures. You have a process by which, in the case of the California State university system, the State hearing officer outside our system can come in and hold a formal hearing on both grievance and disciplinary matters. The faculty committees meet and make recommendations. Presidents can then decide, make their decisions, and their decisions can be appealed; in our case, in the grievance area, to a member of the American Arbitration Association; and in the disciplinary area, to our board of trustees and the California State Personnel Board.

Other universities have somewhat similar processes. Now that applies to all members of the university. But when incompetency or a disciplinary case occurs and the person happens to incidentally be a member of a minority group, a woman, ethnic background, or there is a religious question, etc., they have several more cracks at the process than do most of the other people within the university.

They can call in the California FEPC; they can file with EEOC, with OCR of HEW. I guess my query to you is: When is enough, enough? And does HEW have some suggestions as to how this process can be simplified so these matters do not drag on for years because of all the different forums in which individuals file, when nobody likes to admit they are incompetent?

In this world, nobody likes to admit they violate university fundamentals as far as discipline goes. But do you have suggestions as to how we can get some responsible process of appeal to grievances and disciplinary matters when race, color, sex, religion, ethnic origin are involved so that the case is not constantly being retried in a different forum because the person doesn't like the result?

MR. HOLMES. Dr. Horn, it is a very difficult area, and one in which I am not trying to pass the buck. But I encourage the Commission and its resources to focus on it.

The issue has come up with every agency. EEOC has delegated certain complaint investigation responsibilities, and there was a draft of the Title IX regulations at one point that required higher education or educational institutions to establish grievance procedures and then said that the Office for Civil Rights may defer action on any complaint filed by an individual pending the exhausting of the administrative relief through the grievance procedures by the individual.

This was extremely controversial and had a very negative response. And subsequently it was dropped by us. The Title IX regulation, nonetheless, continues to require educational institutions to establish grievance procedures. But it does not in any way infringe on the individual's right at any time in those procedures to file a complaint with the Federal Government.

Now, as a practical matter I think the wisest policy would be upon receipt of a complaint like that, and in checking and identifying that the individual is actively involved in an administrative grievance procedure, we should await the outcome of that, assuming the outcome is not going to involve some unreasonable period of time. This is an extremely difficult issue to grope with and an extremely major step to take. Bill [Taylor], you are a lawyer and probably much more expert on this than I am. Maybe you have a feeling.

VICE CHAIRMAN HORN. Well, the point is: Couldn't the Federal Government either supersede the States in these matters if they don't have faith in the State process or delegate it to them or coordinate their own efforts so there is one forum of appeal should race, color, etc., be involved?

MR. HOLMES. There is no question delegations could be worked out. As I said, EEOC has worked out delegations to a number of States' human relations agencies. We could conceivably do the same thing and have considered it in the Title VI-Title IX area. But the existence of State agencies with enforcement powers in the nonemployment area, I think, are somewhat rare.

It seems to me in the employment area is where you have your agencies with enforcement powers at the State level. But it is an issue that we are continually looking at but don't have an answer to.

CHAIRMAN FLEMMING. May I again express appreciation for the way in which you have dealt with the issue. Our objective in this public consultation is to get these issues out on top, to get points of view drawing on persons' experiences in dealing with the issues, and then to arrive at our own findings and recommendations. Thank you very much.

At this point we will take just a 3- or 4-minute break. As I indicated earlier, members of the panel that were to start at 1:30 are here joining us after the break, and we will just kind of play it by ear from that point.

I know a good many are here, and I can assure those who are interested in hearing some who are not here that we will stay in session until everybody is heard and until we have had the opportunity of addressing questions to everyone.

Fourth Session: Reactions of Colleges and Universities

CHAIRMAN FLEMMING. Now, may I ask that we resume the session and continue with the reactions of colleges and universities. It seems to me we are in for a real treat because I know that the reactions will differ somewhat, one from the other. I am very, very happy that we can start with Dr. Bernice Sandler, the director of the project on the status and education of women, Association of American Colleges.

Ms. Sandler is in a position where she understands the problems on the other side of the table, namely, to confront those who are in Government, and who at the same time has a very real understanding of the problems from the standpoint of the colleges and universities. So I am very happy to recognize her at this time.

You will note some of the members of the panel are here and some are not. Their names are there. But after Dr. Sandler finishes, we will see how many other persons are here and ask them to join us also.

Dr. Sandler, thank you for agreeing to develop a presentation and for being here to present it.

PRESENTATION OF BERNICE SANDLER

DR. SANDLER. Thank you, Mr. Flemming.

As I understand it, I was quoted as having said something earlier this morning. Since I haven't seen what I was actually quoted as saying, I am not quite sure I was quoted accurately. I may or may not have been. So, I want to say I don't know what the quote was, but, from what people have told me, I have a feeling it was not accurate.

I am not going to read my whole paper, since it will be reprinted in its entirety. But let me go over some points I think are most important.

More charges of sex discrimination have been filed against institutions of higher learning than against any other industry in the country. Many of the problems in higher education deal with the problems of sex discrimination and of minority discrimination too. About 1,600 charges, most of them sex discrimination, have been filed under Title VII of the Civil Rights Act—indeed in 1973, 1 out of every 40 charges was against an institution of higher learning. Perhaps as many as 1,000 charges have been filed under the Equal Pay Act.

Not one charge of a pattern of sex discrimination in a college or university investigated by HEW has ever been refuted. The problems of academia and discrimination have not been solved with the simple passage of new legislation.

Hearings held before the House Special Subcommittee on Education in August and September of 1974 and those held before similar committees in State legislatures continue to document the familiar patterns of discrimination. Not enough time has yet elapsed, and too often the laws have been unenforced or enforced badly. But without this legislation there would have been little change at all.

I want to talk a little bit about how institutions can become involved with affirmative action in a variety of ways.

One, any institution can voluntarily develop an affirmative action plan if they want, and a few have done that.

Two, institutions which *voluntarily accept a Government contract* are required to develop affirmative action plans, including numerical goals.

Three, an institution which has been charged with discrimination under Title VII, the 14th amendment, the 5th amendment, Title IX, and

possibly the Civil Rights Acts of 1866 and 1871 may be required to develop affirmative action procedures as a result of conciliation or as a private settlement of a suit under these laws. Numerical goals may or may not be included.

Fourth, if conciliation or private settlement of the suit has failed, the court may impose affirmative action requirements, including numerical goals.

The opponents of affirmative action often use the term loosely, and sometimes erroneously, to describe a variety of actions. Broadly speaking, affirmative actions are efforts aimed to end discrimination and to remedy the effects of past discrimination. It includes a great many activities which are not controversial, such as notifying women's and minority groups about job openings, advertising job openings rather than relying on word-of-mouth notification, developing recruiting procedures aimed at women and minorities as well as at other qualified applicants, etc.

Most of the progress that has occurred on the campus has been in these areas. The Executive order has required institutions covered by it to deliberately assess all of their recruiting, hiring, and employment policies for possible bias.

Overt policies and practices, such as discriminatory fringe benefits and antinepotism rules prohibiting the employment of spouses, have been revised and/or eliminated far beyond the traditional practice of a department head calling a colleague and asking if he knows a "a good man" for the job. Women and minorities are typically outside this "old boy" network. With increased recruitment activity, the pool of qualified persons from which a selection is ultimately made is more likely to include qualified women and minorities.

The evaluation of existing staff and faculty in terms of salary, rank, and job assignment has often been painful, particularly financially. Many institutions were surprised at the number of women who were paid substantially less than their equally-qualified male colleagues. *Several million dollars* have gone to campus women in salary adjustments. These average about $1,000 per woman, although I know of one woman who received an increase of *$13,000* and another who received a *$22,000* increase. In most instances the women did not receive back pay, although technically they are entitled to it under the law.

As part of a continuing assessment and in line with Federal requirements, many institutions now require documentation on the part of search committees of an expanded recruitment effort, specification of criteria, and justification of the hiring decision. While the latter has in too many instances become a mere paper exercise, it nevertheless has been a sore spot with many administrators who have never had to justify *in detail* why a particular person was the *best* person for a job and not *merely* well qualified. Affirmative action, far from lowering the standards of academia, is more likely to *raise* the quality of decisions by

ensuring that they are truly based on merit and not on extraneous bases such as race, sex, national origin, or religion.

Perhaps the most progress has been made in the *simple acknowledgement that there is a problem.* Few academics would deny, as they did a few years ago, that discrimination exists. Now, many institutions have some type of institutional structure, such as a committee, to examine women and minority issues. Although the committees often have little or no power, they nevertheless can serve a useful purpose in articulating problems and solutions.

Although many academics understandably complain of the burdensome paperwork required by affirmative action, there have nevertheless been unexpected benefits from the collection of data. One major, private, prestigious institution had no central list of all of its faculty and staff; many had no records as to how many persons would be expected to reach retirement within a specified period of time; others had no written standards or procedures for hiring, promotion, termination, etc.; still others had total figures of staff and faculty by department but had no overall institutional data showing the total number of tenured and untenured faculty or the number of faculty at each rank.

Such data are of course essential to good management and long-range planning. The benefits of such data, as well as the benefits gained by ensuring that merit is the basis of employment decisions, are rarely articulated when the costs of affirmative action are assessed. For the first time many institutions are collecting data that is not only necessary for affirmative action but essential for effective fiscal planning and management.

Affirmative action, however, is not without its problems; commitment varies from institution to institution. In some, the affirmative action officer is a low-level administrator with little authority or access to the power structure of the institution. Institutional monitoring of personnel decisions and procedures varies from an all-too-rare, step-by-step evaluation to a routine check as to whether the proper forms were filled out. In some institutions, affirmative action is merely "going-through-the-motions"—although women and minorities are sought through advertisements, they are less likely to be invited to interviews and still less likely to be hired, for many candidates are still preselected by department heads or search committees. Faculty are often uninformed as well as some administrators and college attorneys.

Sex discrimination is no longer a moral issue only; like race discrimination, it is a legal issue as well. Sex discrimination is the last socially acceptable prejudice. For the first time in history, we have a national policy forbidding discrimination based on race, color, national origin, religion, and sex. Virtually all of the principles developed in the courts that apply to race discrimination apply to sex discrimination. Increasingly, minority and women's groups are working together on issues of mutual concern.

Of all the areas involved in affirmative action, the concept of numerical goals and timetables is perhaps the most controversial. Numerical goals are often confused with quotas; the terms are often erroneously used interchangeably. However, the *Government and the courts* have made a clear distinction between the two: Goals are legal; quotas clearly violate the Constitution and numerous Federal statutes. Quota systems keep people out; goals are targets for inclusion of people previously excluded. *Goals are an attempt to estimate what the employer's work force would look like if there was no illegal discrimination based on race or sex.* Goals are aligned with the number or percentage of qualified women and minorities available and *not* in terms of their general representation in the population.

Under the Executive order, the institution does its *own* analysis of its work force and determines if there is underutilization of women and/or minorities. For example, women receive about 23 percent of the doctorates awarded in psychology, and studies indicate that 91 percent of women with doctorates work. Furthermore, approximately 23 percent of the psychologists listed with the National Register of Scientific and Technological Personnel are female. Thus, if there were no women or substantially less than 23 percent in a department of psychology, "underutilization" would exist.

Moreover, goals are *not automatically required* of every institution holding Federal contracts. *Institutions which can demonstrate an absence of underutilization of women and minorities do not have to develop goals.* While some institutions have been able to show that there is no underutilization in a particular department, the problem of discrimination in our colleges and universities has been so widespread over so long a period of time, that *not one institution* covered by the Executive order has been able to show that the percentage of women and minorities among their faculty were what could be normally expected in light of the number of qualified women and minorities.

Underutilization, under existing case law, raises a presumption of discrimination under the Executive order and Title VII. When statistical evidence indicates that there has been a pattern of discrimination, the burden of proof is then shifted to the employer, who must then demonstrate that there is and has been no discrimination, that the job criteria are indeed job-related, and that employment practices do not and have not had a discriminatory effect. An institution able to do so would clearly be exempt from the requirement of numerical goals. *Not one institution has ever requested such an exemption.*

Goals have been upheld in the courts as relief for a substantiated *pattern* of discrimination. The aim is *not* punitive; no one is required to be fired. Goals are simply an attempt to remedy the continued effect of discrimination in the present and to give relief to a specific class that has been discriminated against in the past.

The goal is tailormade to a specific situation, in terms of anticipated employee turnover rate, new vacancies, promotion and upgrading, and the availability of qualified women and minorities. The goal varies for different job classifications; it could be as general as one for "psychologist" or it could be more specific, such as one for "clinical psychologist." It will obviously vary for different job classifications; and within institutions, it will vary from department to department.

Given the fact that there has been discrimination in the past, and that as a result of that discrimination the number and percentage of women and minorities on the faculty is often substantially below what would be expected in terms of available qualified women and minorities, affirmative efforts to recruit such persons and to eliminate discriminatory policies and practices would result in an increase of women and minorities on the faculty over a period of time. The goal is the estimate of that increase.

So academics have been puzzled and somewhat bewildered by the impact of the various Federal laws and regulations. Long accustomed to holding a privileged place in American society and often convinced that discrimination was not a problem on *their* campus, some academics have raised the cries of "Federal interference with academic freedom," the "decline of merit on the campus," and "reverse discrimination." Many misconcepts abound and need to be examined.

Many people believe that goals and quotas are identical and that goals require preferential treatment. However, the courts have indicated that affirmative action in employment is legal and does not constitute preference *when undertaken to remedy past discriminatory practices.* Indeed, preference is clearly illegal under the Executive order, Title VII [see section 703(j)], and all other laws requiring nondiscrimination. *No institution is required to hire women or minorities on the basis of sexual or racial preference.* To do so would clearly be illegal. Affirmative action is not aimed at creating preference but at *ending* the preference for white males, which has always existed in academia.

What the Executive order and Title VII do require is the *obligation of fair recruiting and hiring.* If an institution fails to meet the goals, it then has to show that it made a good-faith effort to recruit, hire, and promote qualified women and minorities, and it has to be able to produce records documenting those efforts. For example, the department head may show that he or she has contacted women's and minority groups (such as the women's and minority caucuses relevant to the discipline), has contacted individual women and minority scholars for referral of candidates, has included in letters to colleagues and in job advertisements statements like "women and minorities, including minority women, are welcome to apply" and has also evaluated those already in the department who might qualify for the opening. If, after doing this, it turns out that all the women and

minorities were poorly qualified and the white male hired was indeed *the best-qualified applicant,* the employer can document a good-faith effort at affirmative action and thus justify the decision to hire the white male. If so, the employer has discharged the obligation under the Executive order; *the obligation to meet the goal is not absolute.*

There is no requirement whatsoever that would force academicians to hire lesser-qualified women or minorities. If the best-qualified person is white and male, then that person can be hired. What the employer must be able to demonstrate is threefold:

1. A genuine good-faith effort to recruit women and minorities.
2. Specification of job-related objective criteria, before the hiring process. Although the criteria for professional jobs are difficult to assess, they are subject to the same requirements as other jobs.
3. Equal application criteria. Whatever standards or criteria are set for white men must be applied equally to women and minorities.

In some instances, *courts* have imposed a kind of limited preference—more stringent numerical goals than those required by institutions under the Executive order. Court-ordered goals have occurred *only* in public employment and industrial settings and *not in academia* .

The differences between court-ordered goals and those required under the Executive order are critical:

1. Under the Executive order, goals are set *by the institution,* after it does its own analysis. In a court situation, the Federal Government does the analysis and sets the goal.
2. Under the Executive order, the *best-qualified* person may be hired.

Only in a court situation, a lesser-qualified person may be given preference in hiring. This limited preference has been allowed in our courts *only after a finding of discrimination,* and *for a limited time only* . In contrast, the affirmative action requirements that institutions *voluntarily* assume when they accept a contract, however, do not in any way *allow or compel* institutions to give preference to lesser-qualified persons on the basis of race, color, national origin, or sex.

In the few cases where goals have been overturned by the courts, it was because the goal was not a goal but a quota and because there was no provision to ensure that qualified persons were hired.

Some people claim that institutions are giving sexual and racial preference in hiring.

Any institution that gives preference in hiring on the basis of sex or race or ethnic origin is violating the law. Those that claim that they have been "forced" to give preference to lesser-qualified women and minorities have sadly misunderstood the law and their rights under it.

The data concerning the increase in the hiring of women and minorities in academia simply do not uphold the academic myth that women and minorities are being hired in any great numbers by the academic community. An American Council of Education study

reports that over the 5-year period from 1968 to 1973, minority faculty employment increased all of 0.9 percent, from 19.1 to 20 percent of the total faculty. Several institutions, after a year or two of affirmative action programs, report a *drop* in women and minority faculty, even though the number and percentage of white male faculty increased during that period.

The National Academy of Sciences reports that the unemployment of women with doctorates in science, engineering, and social sciences is more than four times as high as the unemployment rate of their male colleagues: 3.9 percent compared to 0.9 percent. A study at the University of Michigan of recent doctoral recipients showed that women doctorates were unemployed at three times the rate of their male counterparts.

Similar studies conducted within particular disciplines show the same pattern. The fear that unqualified women are "invading" the tenured ranks seems to have little basis in fact.

While it is true that academic hiring has indeed slowed down, many institutions are still increasing their faculty, although at a far slower rate than previously. But few women and minorities are being hired, and when they are hired, it is almost always at the lower ranks. Although the University of Minnesota, for example, reported that about half of its increase in academic staff in 1973 consisted of women and minorities, the women and minorities were hired in *low* positions, part-time, 1-year contracts, instructorships, and the like. In contrast, only 3 of the 53 associate professor appointments went to women, and all 3 were either part-time or visiting appointments.

Some academicians argue that academic quality *decreases* as a result of affirmative action. The Equal Pay Act, Title VII, and the Executive order all specifically *allow differences in pay and rank to be based on seniority and merit,* provided that the seniority and merit systems are not based on sex or any other impermissible classification.

The myth is that reverse discrimination is endemic and that white males are having difficulty because preference is being given to women and minorities. It is, of course, true that in a time of restricted budgets and a contracted economy, it is harder for *anyone,* male or female, to find academic employment, but that is *not* reverse discrimination.

Some of the complaints have been specious; several white men have complained of reverse discrimination simply because a woman or minority was hired and they were not. The mere hiring of a woman or minority, no matter how qualified, is assumed by some to be *prima facie* evidence of "reverse discrimination." In fact, the few women that have been hired have generally been superbly qualified. Our project has seen no data to confirm, nor does anyone else offer data indicating, that institutions have given preference in any large way on the basis of race or sex and indeed hired unqualified or lesser-qualified women and minorities. Such preference, if it existed, would violate the law.

Increasingly, the claim that academia is "special" and "different" from other sectors of society is being raised as a justification to weaken the coverage of the Executive order over institutions of higher education. What some administrators object to most is the Federal interference with the "traditional" methods of employment decisions in academia. No one wants the Government to watch over their shoulder; but, on the other hand, it is difficult to justify why academia alone should be exempt from the same rules and regulations that apply to every other employer in the country.

Institutions are upset because they have generally relied on the "old boy" method of recruiting and hiring—the vast informal network of old school chums, colleagues and drinking buddies, etc.—a network to which women and minorities rarely have access. The merit system has always been a closed merit system, for large portions of the available, qualified pool have been excluded. The Government is not asking that the merit system be abolished but only that it be opened to a larger pool of qualified persons. To recruit in a different manner means change, and change is never easy, particularly if it means women and minorities coming in to challenge the power base.

HEW, incidentally, *does not set criteria* for hiring and promotion; rightfully, that is the prerogative of the institution and its departments. What the Government does ask is that the criteria be related to the job and that institutions specify what the criteria are and how they are evaluated.

No one is questioning the right and responsibility of the tenured faculty to recommend new appointments, reappointments, promotions, and salary increases. The Government does not disturb this arrangement other than to ask that the persons making decisions be able to *justify* that those decisions were indeed made on the basis of quality and individual merit and not based on any discriminatory factors. The justification of such decisions should not hamper the governance and decisionmaking traditions of academia; indeed *it is far more likely to improve the quality of such decisions.*

Another argument used to attack affirmative action is that the principles developed by the courts in industrial settings should not be applied to academia. While it is indeed true that academia is unique in many ways, it is indeed difficult to justify that employment in academia—other than in its decentralization—is markedly different from any other professional employment. Certainly, hospitals, law firms, top management in industry, etc., also want to hire the best-qualified persons, judged on the basis of professional competence. Even more importantly, if the principles developed under our statutes and Constitution are *not* applicable to academia, then what indeed should apply? Certainly, the time-honored academic principle of hiring the *best* qualified on the basis of merit is not threatened by regulations which require exactly that: *hiring the best-qualified person on the basis of*

merit. Shall we exempt institutions from having to justify a hiring decision? Shall we exempt academic institutions from having criteria that are related to the job at hand and are not biased? Shall we exempt institutions from Executive order requirements to do a self-study to uncover discrimination? Shall we exempt institutions from keeping data which might identify discriminatory patterns?

The question is not so much one of whether academic institutions are different from industry but whether or not the *rights of individuals* who work in academic institutions should be different from the rights of individuals who work in industry and in other settings.

Any attempt to exempt academia from the Federal regulations and statutes that prohibit discrimination would deprive women and minority faculty of the fundamental civil rights now enjoyed by all citizens of this country. It would be the first step backward in civil rights legislation, and it would set a dangerous precedent for other segments of society seeking exemption from these laws. Moreover, the Congress specifically rejected the notion that academic institutions should be treated separately from the rest of the country when it amended in 1972 Title VII of the Civil Rights Act of 1964, deleting the exemption of educational institutions.

In summary, affirmative action is coming under a good deal of criticism, partly because it has been badly administered and partly because some administrators have misunderstood the Federal requirements. It would be tragic for the rights of citizens in this country if we confuse poor administration with imperfections in the law itself.

The academic community is one of the most powerful in this country—not because of money or direct power but because it is responsible for training the youth and leaders of America. If women and minorities are to have the birthright that is that of their white brothers, they must have the opportunity to partake in the fruits of higher education as students, as staff, as faculty, as administrators. To weaken *any* of the laws that protect them from discrimination, particularly those that affect education, would be a serious abrogation and denial of the rights of women and minorities.

The legislation that prohibits discrimination on the campus is very new. We had all hoped that with the passage of these laws that prohibited discrimination on the campus, a new era had begun. But already, within a few short years, the backlash has begun, and attempts to weaken existing laws and regulations are well underway.

At the same time that many people are critical of HEW as being inconsistent and unable to understand academia, the same persons are recommending that the main agency to deal with discrimination in academia be *HEW.* Some women's groups interpret this as an indication that some would prefer HEW because it is most likely to be the weakest of all the enforcement agencies. Whether this is true or not is unclear; however, of all the agencies involved, HEW is most prone

to respond to pressure from academic institutions, so women's groups are somewhat concerned about the rights of individuals in those circumstances.

The backlash, while undoubtedly related to budget constraints and to the long history of academic independence from Federal restraints, is also related to the fact that women's issues are the major area of focus in higher education. Indeed, one of the major differences between academic discrimination and that in industry is that the issues in academic employment have been focused far more heavily on women's issues than on minority issues. HEW became involved in discrimination issues on the campus not because of liberal support for minorities or because of substantial minority pressure; it came about because women filed charges against universities, and when the Government comes in, they examine discrimination not only against women but against minorities as well. There is a "critical mass" of women on virtually every campus in the country—enough women to raise issues and press for change. It is this fact—the sizable numbers of women already on each campus as students, staff, and faculty—that may account in part for the greater resistance of academia when compared to that of industry: It is difficult for some persons to accept the fact that at some point women could indeed "control" an institution. Even if discrimination based on race and national origin were to end at all levels of education, it is not likely that minorities would ever occupy much more than 15 to 20 percent of the academic positions in the country; in contrast, women could potentially fill *half* of the positions. Many men are unconsciously or consciously worried about their relationships with their wives; there is literally one of us "in every house." Thus, the "threat" of women "taking over" may be far more anxiety-provoking to some men than the threat of minorities.

In the next 10 years, virtually every educational institution will face two major issues: the budget crunch and discrimination. Women and minorities are asking for a total evaluation of all campus policies and practices that have disproportionate impact on women and minorities. The changes will not only be good for those groups but for *all* people. I am reminded of one institution which finally allowed part-time, tenured faculty. The first person to request a part-time assignment was a white male who wanted to spend some time writing and still keep a finger in the academic pie. What had started out as a "women's issue" led to a more flexible policy which benefited all members of the institution.

The women's movement has the potential to truly humanize academia, and administrators who truly care about their institutions would be wise to use women and minority issues as a lever for change, to make the academic community a truly humane place.

Affirmative action at its best requires the revision of standards and practices to assure that institutions are in fact drawing from the largest

marketplace of human resources in staffing their faculties, and a critical review of appointment and advancement criteria to ensure that they do not inadvertently foreclose consideration of the best-qualified persons by untested presuppositions which operate to exclude women and minorities.

At its worst, affirmative action is a plethora of myths and misinterpretation, inefficiency by HEW, and a lack of knowledge on the part of administrators, etc. Yet, despite all the complaints and criticisms, it is interesting to note that *not one institution has ever had funds withdrawn or terminated because of discrimination. Not one institution has ever had new contracts delayed because of discrimination* , although some institutions have had delays because of lack of an affirmative action plan. *Not one institution until just a few days ago has ever requested a hearing* under the Executive order. *Not one institution has ever had funds terminated, withdrawn, or delayed because of its failure to meet numerical goals. Not one charge of a pattern of sex discrimination filed with HEW has ever been refuted.*

The problems ahead of us are tremendous, and the first blush of enthusiasm and optimism may well be over for those of us involved in the activities of the last few years. We have made enormous progress in terms of legislation and in terms of awareness, and we have begun to change actions on the part of many.

Women are the fastest growing, and potentially the largest, advocacy group on the campus and, indeed, in the Nation. They are banding together on individual campuses, at the State level, within particular disciplines, and across the Nation. They are building coalitions with minority groups.

Let me close with a newly discovered "revelation" from the Bible, discovered by a woman archaeologist, and which characterizes the new mood of women on the campus:

And they shall beat their pots and pans into printing presses,
And weave their cloth into protest banners;
Nations of women shall lift up their voices with nations of other women;
Neither shall they accept discrimination anymore.

This may sound apocryphal, but I suspect it may yet prove to come from the Book of Prophets. For what women are learning is the politics of change; they have learned that the *hand that rocks the cradle can indeed rock the boat.*

[The complete paper follows.]

Affirmative Action on the Campus: Progress, Problems, and Perplexity

By Bernice Sandler*

In the late 1960s as women began to reexamine their status in the Nation's colleges and universities, they were rudely surprised to learn that existing Federal statutes simply did not cover them. Then, in January 1970 Pandora's box was opened by a little-known women's civil rights group, the Women's Equity Action League (WEAL), which filed a class action against all colleges and universities, charging a pattern of discrimination. Using a Presidental Executive order which prohibited Federal contractors from discrimination in employment, WEAL launched a nationwide campaign to end sex discrimination on the campus. The order, which hitherto had been used primarily with blue-collar workers in industry, would eventually challenge the entire academic community. Within months, HEW began investigating several prominent institutions, while WEAL and other groups quickly filed charges against several hundred institutions. By June 1970, Representative Edith Green began the historic and first hearings concerning discrimination against women in academia. The 92nd Congress subsequently articulated a new national policy to end sex discrimination in all educational institutions at all levels, including students, staff, and faculty, from nursery school to postgraduate education.

The speed with which the Congress extended Title VII of the Civil Rights Act of 1964 to include all educational institutions;[1] amended the Equal Pay Act of 1963 to cover executive, administrative, and professional employment;[2] amended the Public Health Service Act to cover admissions to all health professional training programs;[3] enacted Title IX of the Education Amendments Act of 1972 to cover all phases of student treatment, including admissions;[4] and added sex discrimina-

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[1] Pub. L. No. 92-261 §2, 86 Stat. 103, *amending* 42 U.S.C. §2000e-1 (1970).

[2] Pub. L. No. 92-318, Title IX, §906(b)(1), 86 Stat. 373, June 23, 1972.

[3] Pub. L. No. 92-157 §110, 85 Stat. 431, *amending* 42 U.S.C.A. §295-9.

[4] Pub. L. No. 92-318, Title IX, §901, 86 Stat. 373, June 23, 1972. Private undergraduate institutions and public single-sex schools are exempt from the nondiscriminatory admissions provisions. However, there can be no discrimination on the basis of sex against students in such institutions once they have been admitted.

tion to the jurisdictions of the United States Commission on Civil Rights[8] indicates that Congress was acutely aware of discrimination against females in our educational institutions. There was virtually no opposition to the passage of these laws by either the educational community or the public at large. Sex discrimination, once only a philosophical or moral issue, is now a legal issue as well. These laws are not merely employment laws; they are civil rights laws with a different legislative and judicial history.

More charges of sex discrimination have been filed against institutions of higher learning than against any other industry in the country. More than 500 institutions have been charged under Executive Order 11246; about 1,600 charges (most of them sex discrimination) have been filed under Title VII of the Civil Rights Act—indeed in 1973, 1 out of every 40 charges was against an institition of higher learning. Perhaps as many as 1,000 charges have been filed under the Equal Pay Act. Not one charge of a *pattern* of sex discrimination in a college or university investigated by HEW has ever been refuted.

Of all the areas in our society that have come under criticism for treatment of women and minorities, one of the most frequent targets has been that of higher education. I do not want to imply that academia is worse than the rest of society, but certainly the anger and discontent of women is sharpest in academia. Many persons have noted that discrimination against women on the campus is so widespread that it is a national scandal. I can tell you of women who earn less than the equally qualified men they work alongside. I can tell you of women who in time of budget cuts are terminated "because they are married and don't need the job," and of other women who are also terminated "because they are *not* married and have no family to support and don't need the job." Despite the changes in the law, there are still too many women and minority persons whose lives have been damaged and whose careers have been stunted.

The problems of academia and discrimination have not been solved with the simple passage of new legislation. Hearings held before the House Special Subcommittee on Education in August and September of 1974, and those held before similar committees in State legislatures, continue to document the familiar patterns of discrimination. Not enough time has yet elapsed, and too often the laws have been unenforced or enforced badly. But without this legislation there would have been little change. When Representative Green's hearings were held in 1970, not one member of the educational establishment offered to testify. "There is no sex discrimination on the campus," they said, "and besides, it's not a problem."

The basic laws covering the academic community are summarized briefly, with a special emphasis on affirmative action.

[8] Pub. L. No. 92-496 §3, 86 Stat. 813, *amending* 42 U.S.C.A. §1975c(a) (1975).

Executive Order 11246 as Amended by Executive Order 11375

The Executive order covers *only* those institutions which hold Federal contracts. It is not law, but a series of rules and regulations which contractors *agree* to follow when they accept a Federal contract. Its main provision is that the contractor must have a written plan of affirmative action to "remedy the effects of past discrimination" and to prevent the continuation of current discrimination. The Department of Labor, through its Office of Federal Contract Compliance, is responsible for all policy matters under the Executive order; the Department of Health, Education, and Welfare, however, does the actual review and enforcement in universities and colleges.

Institutions which *voluntarily* agree to provide a service to the Government[6] by way of a contract are required to undertake affirmative action, regardless of whether or not there has been a finding of discrimination. Such action includes, but is not limited to, numerical goals.

Should an institution fail to follow the requirements of the Executive order, contracts can be delayed, suspended, or terminated.

The Equal Pay Act of 1963, as Amended By Title IX Of The Education Amendments of 1972

In 1972 Title IX extended the coverage of the Equal Pay Act to executive, administrative, and professional employees. It is enforced by the Wage and Hour Division of the Department of Labor. Like the Executive order (but unlike Title IX) reviews can be conducted without a prior complaint.

If a violation is found the employer is asked to settle on the spot; i.e., raise the wages and pay back pay to the underpaid workers. Should the employer refuse, the Department of Labor can initiate litigation against the employer.

Title IX of the Education Amendments of 1972 (Higher Education Act)

Title IX prohibits sex discrimination against students and employees in institutions receiving Federal monies by way of a grant, loan, or contract. Title IX is patterned after Title VI of the Civil Rights Act of 1964, which forbids discrimination on the basis of race, color, and national origin in all federally-assisted programs. The Department of Health, Education, and Welfare is the enforcement agency.

Affirmative action is *not* required but can be imposed after a finding of discrimination.

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[6] In contrast, monies having the purpose of *assisting the institution* —rather than *providing a service* — carry no affirmative action requirements.

Title VII of The Civil Rights Act of 1964, as Amended by the Equal Employment Opportunity Act of 1972

Title VII was amended on March 24, 1972, to cover educational institutions and prohibits discrimination on the basis of race, color, national origin, religion, and sex in employment by unions and by employers. It applies to *all* institutions, public or private, whether or not they receive any Federal funds. Title VII is enforced by the Equal Employment Opportunity Commission. However, unlike the Executive order, no affirmative action is required; employers are required merely to note discrimination in employment. A conciliation agreement or court order *may* require affirmative action, but this would be *after* a finding of discrimination. Should conciliation fail, EEOC can take an employer to court.

The basic body of legal principles applying to employment discrimination has been developed in Title VII litigation and in cases involving the 5th and 14th amendments of the Constitution.

When Is Affirmative Action Required?

Institutions can become involved with affirmative action in any of the following ways:

1. Any institution can *voluntarily* develop an affirmative action plan.
2. Institutions *which voluntarily accept a Government contract* are required to develop affirmative action plans, including numerical goals.
3. An institution which has been *charged with discrimination* under Title VII, the 14th amendment, the 5th amendment, Title IX, and possibly the Civil Rights Acts of 1866 and 1871, may be required to develop affirmative action procedures *as a result of conciliation or as a private settlement of a suit under these laws* . Numerical goals may be included.
4. If conciliation or private settlement of a suit has failed, *the court may impose affirmative action requirements,* including numerical goals.

Discriminatory Practices and Policies: A View From the Courts

Despite some overlapping coverage, the principles utilized by the separate Federal agencies to determine policies regarding discrimination are remarkably similar. EEOC, the Department of Labor, and HEW continually examine court decisions concerning discrimination and use these decisions as a solid base for determining policy.

Many of the issues now being debated somewhat *ex post facto* in the halls of ivy have already been decided in the courts.

Court decisions that were previously applicable to discrimination in nonacademic settings now extend to the educational world. Most of these decisions have occurred in cases involving race, but the principles essentially extend to other minority groups, including women.

Thus, the policies of affirmative action and numerical goals are based on concepts and precedents which derive from statutes, legislative histories, judicial decisions, the principle of equity, and the Constitution. They do not derive from an "industrial" model.

Civil rights legislation and court decisions are intimately related to the concept of *equity:* "setting things right." This is the guiding principle that underlies numerical goals. The Supreme Court has stated that a court:

> . . .may order such affirmative relief as may be appropriate. [It] has not merely the power, but the *duty* to render a decree which so far as possible [will] eliminate the discriminatory effects of the past as well as bar like discrimination in the future. [*Louisiana* v. *United States,* 380 U.S. 145 (1965). Emphasis added.]

The Impact of Affirmative Action

The opponents of affirmative action often use the term loosely and sometimes erroneously to describe a variety of actions. Broadly speaking, affirmative actions are efforts aimed to end discrimination and to remedy the effects of past discrimination. It includes a great many activities which are not controversial, such as notifying women's and minority groups about job openings; advertising job openings rather than relying on word-of-mouth notification; developing recruiting procedures aimed at women and minorities as well as at other qualified applicants, etc.

Most of the progress that has occurred on the campus has been in these areas. The Executive order has required institutions covered by it to deliberately assess all of their recruiting, hiring, and employment policies for possible bias. Overt policies and practices, such as discriminatory fringe benefits and antinepotism rules prohibiting the employment of spouses, have been revised and/or eliminated in many cases. Recruitment sources have been expanded far beyond the traditional practice of a department head calling a colleague and asking if he knows a "good man" for the job. Women and minorities are typically outside this "old boy" network. With increased recruitment activity, the pool of qualified persons from which a selection is ultimately made is more likely to include qualified women and minorities.

Moreover, as institutions have examined the hiring process, they have begun to examine criteria for jobs as well. While this is indeed a difficult area, it is nevertheless crucial in order to ensure that the

criteria are truly job related, as objective as possible, and applied fairly.[7]

The evaluation of existing staff and faculty in terms of salary, rank, and job assignment has often been painful, particularly financially. Many institutions were surprised at the number of women who were paid substantially less than their equally qualified male colleagues. *Several million dollars* have gone to campus women in salary adjustments. These average about $1,000 per woman, although I know of one woman who received an increase of *$13,000* and another who received a *$22,000* increase. In most instances the women did not receive back pay, although technically they are entitled to it under the law.

As part of a continuing assessment and in line with Federal requirements, many institutions now require documentation on the part of search committees of an expanded recruitment effort, specification of criteria, and justification of the hiring decision. While the latter has in too many instances become a mere paper exercise, it nevertheless has been a sore spot with many administrators who have never had to justify *in detail* why a particular person was the *best* person for a job and not *merely* well-qualified. Affirmative action, far from lowering the standards of academia, is more likely to *raise* the quality of decisions by ensuring that they are truly based on merit and not on extraneous bases such as race, sex, national origin, or religion.

Perhaps the most progress has been made in the *simple acknowledgment that there is a problem.* Few academics would deny, as they did a few years ago, that discrimination exists. Now many institutions have some type of institutional structure, such as a committee to examine women and minority issues. Although the committees often have little or no power, they nevertheless can serve a useful purpose in articulating problems and solutions.

Although many academics understandably complain of the burdensome paperwork required by affirmative action, there have nevertheless been unexpected benefits from the collection of data. One major private prestigious institution had no central list of all of its faculty and staff; many had no records as to how many persons would be expected to reach retirement within a specified period of time; others had no written standards or procedures for hiring, promotion, termination, etc.; still others had total figures of staff and faculty by department, but had no overall institutional data showing the total number of tenured and untenured faculty or the number of faculty at each rank.

Such data are of course essential to good management and long-range planning. The benefits of such data, as well as the benefits gained by ensuring that merit is the basis of employment decisions, are rarely articulated when the costs of affirmative action are assessed. For the

[7] Courts have already held that promotional policies for executives are subject to the same standards as other employment, and must be job-related. See, for example, Marquez v. Ford Motor Co., Omaha District Sales Office, 440 F.2d 1157 (8th Cir. 1971).

first time many institutions are collecting data that is not only necessary for affirmative action but is essential for effective fiscal planning and management.

Data collection is gradually being unified, with the preparation of the new EEO–6 form for educational institutions. Women's groups note, however, that EEO–6 lists only broad categories, such as faculty, clerical/secretarial, professional nonfaculty, etc. Within each category, there are no data categories other than salary so that discriminatory patterns based on factors other than salary cannot readily be ascertained. A more detailed array of data is also essential in facilitating self-monitoring functions, as well as monitoring by HEW and "public" groups.

Affirmative action, however, is not without its problems; commitment varies from institution to institution. In some, the affirmative action officer is a low-level administrator with little authority or access to the power structure of the institution. Institutional monitoring of personnel decisions and procedures varies from an all-too-rare, step-by-step evaluation to a routine check as to whether the proper forms were filled out. In too many institutions, affirmative action is merely "going-through-the-motions"—although women and minorities are sought through advertisements, they are less likely to be invited to interviews, and still less likely to be hired, for many candidates are still preselected by department heads or search committees. Faculty are often uninformed, as well as administrators and college attorneys.

Court cases, particularly those involving sex discrimination, are increasing and many involve substantial damages. The University of California at Berkeley is being sued by women students, staff, and faculty. At least two suits have been filed against the University of Pittsburgh. Sharon Johnson, a biochemist there who has the distinction of being the first woman in academia to have obtained an injunction forbidding her termination, is suing the university for $1.5 million. Oklahoma State University has the distinction of being the first academic institution against which the Department of Justice, under Title VII, obtained an injunction forbidding termination of a woman faculty member. The Equal Employment Opportunity Commission has requested an injunction against Tufts University. The University of Minnesota is being sued for $750,000, including a charge of conspiracy to deprive a woman faculty member of her civil rights. Columbia, New York University, and the City University of New York are among the many being sued.

Sex discrimination is no longer a moral issue only; like race discrimination, it is a legal issue as well. Sex discrimination is the last socially acceptable prejudice. For the first time in history, we have a national policy forbidding discrimination based on race, color, national origin, religion, and sex. Virtually all of the principles developed in the courts that apply to race discrimination apply to sex discrimination.

Women are the fastest growing and potentially the largest advocacy group on the campus. Increasingly, minority and women's groups are working together on issues of mutual concern.

Opposition to Affirmative Action Goals and Timetables

Of all the areas involved in affirmative action, the concept of numerical goals and timetables is perhaps the most controversial. Numerical goals are often confused with quotas; the terms are often erroneously used interchangeably. However, *the Government and the courts* have made a clear distinction between the two: Goals are legal; quotas clearly violate the Constitution and numerous Federal statutes. Quota systems keep people out; goals are *targets* for inclusion of people previously excluded. *Goals are an attempt to estimate what the employer's work force would look like if there was no illegal discrimination based on race or sex.* Goals are aligned with the number or percentage of qualified women and minorities available and *not* in terms of their general representation in the population.

Under the Executive order, the institution does its *own* analysis of its work force and determines if there is underutilization of women and/or minorities. For example, women receive about 23 percent of the doctorates awarded in psychology, and studies indicate that 91 percent of women with doctorates work. Furthermore, approximately 23 percent of the psychologists listed with the National Register of Scientific and Technological Personnel are female. Thus, if there were no women or substantially less than 23 percent women in a department of psychology, "underutilization" would exist. Such a presumption, based on statistical analysis, has been upheld in the courts. Indeed, statistics such as these can be used as *prima facie* evidence of discrimination. "[S]tatistics often tell much, and the Courts listen. . . ." [*State of Alabama* v. *United States,* 304 F.2d 583, 586 (5th Cir., 1962), *aff'd per curriam,* 371 U.S. 37 (1962)].*

Moreover, goals are *not automatically required* of every institution holding Federal contracts. *Institutions which can demonstrate an absence of underutilization of women and minorities do not have to develop goals.* While some institutions have been able to show that there is no underutilization in a particular department, the problem of discrimination in our colleges and universities has been so widespread and over so long a period of time that *not one institution* covered by the Executive order has been able to show that the percentage of women and minorities among their faculty was what could be normally expected in light of the number of qualified women and minorities.

* See also: Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir., 1970, *cert. denied.* 401 U.S. 423 (1971) *rehearing denied,* 401 U.S. 1014 (1971); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

Underutilization under existing case law raises a presumption of discrimination under the Executive order and Title VII. When statistical evidence indicates that there has been a pattern of discrimination, the burden of proof is then shifted to the employer, who must then demonstrate that there is and has been no discrimination, that the job criteria are indeed job-related, and that employment practices do not and have not had a discriminatory effect. An institution able to do so would clearly be exempt from the requirement of numerical goals. Not one institution has ever requested such an exemption.

Goals have been upheld in the courts as relief for a substantiated *pattern* of discrimination.* The aim is *not* punitive; no one is required to be fired. Goals are simply an attempt to remedy the continued effect of discrimination in the present and to give relief to a specific class that has been discriminated against in the past.

The goal is tailormade to a specific situation in terms of anticipated employee turnover rate, new vacancies, promotion and upgrading, and the availability of qualified women and minorities. The goal varies for different job classifications; it could be as general as one for "psychologists" or it could be more specific, such as one for "clinical pyschologists." It will obviously vary for different job classifications; and, within institutions, it will vary from department to department.

Given the fact that there has been discrimination in the past, and that as a result of that discrimination the number and percentages of women and minorities on the faculty are often substantially below what would be expected in terms of available qualified women and minorities, affirmative efforts to recruit such persons and to eliminate discriminatory policies and practices would result in an increase of women and minorities on the faculty over a period of time. The goal is the estimate of that increase.

Is Preference Required by Law?

Some academics have been puzzled and somewhat bewildered by the impact of the various Federal laws and regulations. Long accustomed to holding a privileged place in American society and often convinced that discrimination was not a problem on *their* campus, some academics have raised the cries of "Federal interference with academic freedom," the "decline of merit on the campus," and "reverse discrimination." Many misconceptions abound and need to be examined.

Many people believe that goals and quotas are identical and that goals require preferential treatment. However, the courts have indicated that affirmative action in employment is legal and does not constitute preference *when undertaken to remedy past discriminatory practices* . Indeed, preference is clearly illegal under the Executive

* For a lengthy but only partial listing of cases, see *Technical Comment No. 1,* International Association of Official Human Rights Agencies, 1625 K St., N.W., Washington, D.C. 20006, Sept. 7, 1972. When appealed to the Supreme Court, the Court has let these decisions stand by denying certiorari.

order, Title VII [see section 703(j)], and all other laws requiring nondiscrimination. *No institution is required to hire women or minorities on the basis of sexual or racial preference.* To do so would clearly be illegal. Affirmative action is not aimed at creating preference but at *ending* the preference for white males which has always existed in academia.

What the Executive order and Title VII do require is the *obligation of fair recruiting and hiring.* If an institution fails to meet the goals, it then has to show that it made a good-faith effort to recruit, hire, and promote qualified women and minorities, and it has to be able to produce records documenting those efforts. For example, the department head may show that he or she has contacted women's and minority groups (such as the women's and minority caucuses relevant to the discipline), has contacted individual women and minority scholars for referral of candidates, has included in letters to colleagues and in job advertisements statements like "women and minorities, including minority women, are welcome to apply," and has also evaluated those already in the department who might qualify for the opening. If, after doing all this, it turns out that all the women and minorities were poorly qualified and the white male hired was indeed *the best qualified applicant,* the employer can document a good-faith effort at affirmative action and thus can justify the decision to hire the white male. If so, the employer has discharged the obligation under the Executive order; *The obligation to meet the goal is not absolute.*

There is no requirement whatsoever that would force academicians to hire lesser-qualified women or minorities. If the best-qualified person is white and male, then that person can be hired. What the employer must be able to demonstrate is threefold:

1. A genuine good-faith effort to recruit women and minorities.
2. Specification of job-related objective criteria, *before* the hiring process. Although the criteria for professional jobs are difficult to assess, they are subject to the same requirements as other jobs.
3. Equal application of criteria. Whatever standards or criteria are set for white men must be applied equally to women and minorities.

In some instances, *courts* have imposed a kind of limited preference—more stringent numerical goals than those required by institutions under the Executive order. Court-ordered goals have occurred *only* in public employment and industrial settings and *not in academia.*

The differences between court-ordered goals and those required under the Executive order are critical:

1. Under the Executive order, goals are set *by the institution* after it does its own analysis. In a court situation, the Federal Government does the analysis and sets the goal.
2. Under the Executive order, the *best-qualified* person may be hired.

Only in a court situation, a lesser-qualified person may be given preference in hiring. This limited preference has been allowed in our courts *only after a finding of discrimination* and *for a limited time only.* In contrast, the affirmative action requirements that institutions *voluntarily* assume when they accept a contract, however, do not in any way *allow or compel* institutions to give preference to lesser-qualified persons on the basis of race, color, national origin, or sex.

In the few cases where goals have been overturned by the courts,[10] it was because the goal was not a goal but a quota and because there was no provision to ensure that qualified persons were hired.

Is Preference Being Given to Women and Minorities in Academia?

Some people claim that institutions are giving sexual and racial preference in hiring.

Any institution that gives preference in hiring on the basis of sex or race or ethnic origin is violating the law. Those that claim that they have been *"forced"* to give preference to lesser-qualified women and minorities have sadly misunderstood the law and their rights under it.

The data concerning the increase in the hiring of women and minorities in academia simply do not uphold the academic myth that women and minorities are being hired in any great numbers by the academic community. An American Council on Education study reports that over the 5-year period from 1968 to 1973, minority faculty employment increased 0.7 percent to 2.9 percent of the total faculty, and women increased all of 0.9 percent, from 19.1 percent to 20 percent of the total faculty. Several institutions after a year or two of affirmative action programs report a *drop* in women and minority faculty, even though the number and percentage of white male faculty increased during that period.

The National Academy of Sciences reports that the unemployment of women with doctorates in science, engineering, and social sciences is more than *four* times as high as the unemployment rate of their male colleagues: 3.9 percent compared to 0.9 percent.[11] A study at the University of Michigan[12] of recent doctoral recipients showed that women doctorates were unemployed or underemployed at three times the rate of their male counterparts.

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[10] See, e.g., the 3rd Circuit's decision overturning part of an order by the United States District Court in the Eastern District of Pennsylvania involving the hiring of policemen (Commonwealth of Philadelphia v. O'Neill, 5 EPD 1974): "This order does not, certainly on its face, limit the pool from which applicants are to be chosen to those necessarily qualified to be policemen."

[11] *Doctoral Scientists and Engineers in the United States, 1973 Profile.* National Academy of Sciences, Washington, D.C. 20418, March 1974.

[12] *The Higher; the Fewer.* Report and Recommendations of the Committee to Study the Status of Women in Graduate Education and Later Careers. School of Graduate Study, University of Michigan, Ann Arbor, Michigan 48104, March 1974.

Similar studies conducted within particular disciplines show the same pattern. The fear that unqualified women are "invading" the tenured ranks seems to have little basis in fact.

While it is true that academic hiring has indeed slowed down, many institutions are still increasing their faculty, although at a far slower rate than previously. But few women and minorities are being hired, and when they are hired, it is almost always at the lower ranks. Although the University of Minnesota, for example, reported that about half of its increase in academic staff in 1973 consisted of women and minorities, the women and minorities were hired in *low* positions, part-time, 1-year contracts, instructorships, and the like. In contrast, only *3* of the 53 associate professor appointments went to women, and all 3 were either part-time or visiting appointments.

Some academicians argue that academic quality *decreases* as a result of affirmative action. The Equal Pay Act, Title VII, and the Executive order all specifically *allow differences in pay and rank to be based on seniority and merit,* provided that the seniority and merit systems are not based on sex or any other impermissible classification.

The myth is that reverse discrimination is endemic and that white males are having difficulty because preference is being given to women and minorities. It is, of course, true that in a time of restricted budgets and a contracted economy it is harder for *anyone,* male or female, to find academic employment, but that is *not* reverse discrimination.

Some of the complaints have been specious; several white men have complained of reverse discrimination simply because a woman or minority was hired and they were not. The mere hiring of a woman or minority, no matter how qualified, is assumed by some to be *prima facie* evidence of "reverse discrimination." In fact, the few women that have been hired have generally been superbly qualified. Our project has seen no data to confirm nor does anyone else offer data indicating that institutions have given preference in any large way on the basis of race or sex and indeed hired unqualified or lesser-qualified women and minorities. Such preference, if it existed, would violate the law.

On occasion, some administrators have used affirmative action as an excuse for turning down applicants they did not want to hire. One department head at a large Western university wrote all but one of the applicants for a position that he could not hire them because HEW "insisted" he hire a woman or minority. However, the last candidate—the one who got the job—was neither female nor minority; it was a white male. Needless to say, practices such as this violate the law, as well as generate inaccurate complaints of reverse discrimination.

On the other hand, some complaints of reverse discrimination have been justified. Some administrators have misunderstood the Federal requirements and have erroneously believed that only women and minorities, including minority women, could be hired. Too often the examples cited by persons who criticize affirmative action are examples

of activities which are *prohibited,* and therefore are not "good" examples of a "bad" regulation. HEW has played a major role in such misconceptions; criticism of HEW for inefficiency, incompetency, and inconsistent interpretations is more than justified.

HEW and Enforcement

The problems of institutions have stemmed far more from the ineptness of HEW enforcement than from defects with the Executive order itself. To confuse the incompetence of HEW with defects in the Executive order, its regulations, or guidelines would be tragic. It would be like saying that because *some* police are inefficient and incompetent, we should therefore abolish the laws they are supposed to enforce. Too often, there has been a vast difference between what the law actually requires and the lack of clear policies at HEW.

Certainly, HEW's OCR has been one of the worst-run agencies in the Government. The Women's Equity Action League (WEAL), the Federation of Organizations of Professional Women, NOW, American Women in Science, and NEA have filed suit against HEW for its poor enforcement. The General Accounting Office (GAO), which is the investigative arm of the Congress, and the U.S. Commission on Civil Rights have both strongly condemned OCR's handling of its compliance responsibilities.[13] Hearings before various congressional committees have confirmed HEW's dismal record of ineptness.[14]

Yet apart from this, HEW is squarely in the midst of a dilemma. As a programmatic agency, its aim is to maintain and develop the educational establishment; its constituency is composed of educational institutions. Women and minorities are *not* the basic constituency. (In contrast, EEOC, as an independent and nonprogrammatic agency, has identified women and minorities as *its* constituency.) Moreover, educational administrators are in a position to exert a good deal of pressure on HEW by both informal and formal contracts; e.g., many Federal officials are former educational administrators. With women and minorities pressing on HEW for strong enforcement of Federal regulations, and educational administrators pressing for more liberal interpretations of the same regulations, HEW has seesawed between saber-rattling on one hand, such as issuing an occassional show-cause order or delaying a new contract, and on the other hand, conducting protracted "negotiations" that often last several *years. As long as enforcement of the Executive order is enforced by the very agency whose*

[13] "The Equal Employment Opportunity Program for Federal Non-Construction Contractors Can Be Improved," A Report prepared for the Subcommittee on Fiscal Policy of the Joint Economic Committee of the Congress of the United States by the General Accounting Office, May 5, 1975, and *The Federal Civil Rights Enforcement Effort—1974,* Vol. III.

[14] See, for example, "Hearings Before the Joint Economic Committee Congress of the United States, Economic Problems of Women" and "Federal Higher Education Programs Institutional Eligibility (Civil Rights Obligations)," Hearing Before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, 93rd Congress, 2nd Session, August and September, 1974.

programmatic aim is to give monetary assistance, it is most unlikely that sanctions involving the withdrawal of that assistance will ever be used to any important degree.

Should Academic Institutions be Exempt from Affirmative Action Requirements? Should There be "Different" Rules for Academe?

Increasingly the claim that academia is "special" and "different" from other sectors of society is being raised as a justification to weaken the coverage of the Executive order over institutions of higher education.

What some administrators object to most is the Federal interference with the "traditional" methods of employment decisions in academia. No one wants the Government to watch over his or her shoulder; but, on the other hand, it is difficult to justify why academia alone should be exempt from the same rules and regulations that apply to every other employer in the country.

If you have never had to justify a hiring or promotion decision, the threat of having to put it in writing can be quite upsetting. On the other hand, if an administrator or committee *cannot* justify a decision, then either someone is in the wrong job or getting the wrong salary or else you have a very poor administrator or committee. Despite claims of an objective merit system, academic judgments in the past have too often been intuitive and subjective. Now instead of being able to justify a candidate merely by saying, "Dr. X is a fine fellow with a good reputation who has published a good deal," department heads will have to develop specific, objective criteria and be able to demonstrate that the candidate is the *very best* person recruited from the largest possible pool, a pool which will include qualified women and minorities. The demands of affirmative action, far from diminishing academic quality, are likely to *increase* it by requiring that hiring and promotion policies be truly based on merit without discrimination.

Institutions are upset because they have generally relied on the "old boy" method of recruiting and hiring—the vast informal network of old school chums, colleagues, and drinking buddies. etc.—a network to which women and minorities rarely have access. The merit system has always been a closed merit system, for large portions of the available, qualified pool have been excluded. The Government is not asking that the merit system be abolished but only that it be opened to a larger pool of qualified persons. To recruit in a different manner means change, and change is never easy, particularly if it means women and minorities coming in to challenge the power base.

HEW, incidentally, *does not set criteria* for hiring and promotion; rightfully, that is a prerogative of the institution and its departments. What the Government does ask is that the criteria be related to the job

and that institutions specify what the criteria are and how they are evaluated.

No one is questioning the right and responsibility of the tenured faculty to recommend new appointments, reappointments, promotions, and salary increases. The Government does not disturb this arrangement other than to ask that the persons making decisions be able to *justify* that those decisions were indeed made on the basis of quality and individual merit and not based on any discriminatory factors. The justification of such decisions should not hamper the governance and decisionmaking traditions of academia; indeed *it is far more likely to improve the quality of such decisions.*

Just as there are those in the private sector of the economy who argue that Federal prohibitions against discrimination will destroy the "free enterprise system," there are those in the academic sector who argue that the same Federal prohibitions will destroy "academic freedom." Yet academic freedom has traditionally meant the right to publish, teach, and work with controversial ideas both in and out of the classroom. Academic freedom has never meant the denial of equal opportunity. How does it violate academic freedom to ask an end to preferences that have always existed: the preference of males, the preference for members of the "old boy" club? In one sense, the words "academic freedom" have become a smokescreen to obscure the basic issues. Women's groups claim that the term is analogous to the cry of "States' rights" and "quality education." It is of interest to note that the Association of American University Professors (AAUP), one of the strongest defenders of academic freedom, has strongly *supported* affirmative action and Executive order coverage of universities and colleges.

Another argument used to attack affirmative action is that the principles developed by the courts in industrial settings should not be applied to academia. While it is indeed true that academia is unique in many ways, it is indeed difficult to justify that employment in academia—other than in its decentralization—is markedly different from any other professional employment. Certainly, hospitals, law firms, top management in industry, etc., also want to hire the best-qualified persons judged on the basis of professional competence. Even more important, if the principles developed under our statutes and Constitution are *not* applicable to academia, then what indeed would apply? Certainly the time-honored academic principle of hiring the *best* qualified on the basis of merit is not threatened by regulations which require exactly that: *hiring the best-qualified person on the basis of merit.* Shall we exempt institutions from having to justify a hiring decision? Shall we exempt academic institutions from having criteria that are related to the job at hand and are not biased? Shall we exempt institutions from Executive order requirements to do a self-study to

uncover discrimination? Shall we exempt institutions from keeping data which might identify discriminatory patterns?

The question is not so much one of whether academic institutions are different from industry but whether or not the *rights of individuals* who work in academic institutions should be different from the rights of individuals who work in industry and in other settings.

Many of the problems that academics have concerning Federal antidiscrimination laws and regulations stem not so much from academe's uniqueness but from the problems of professional employment, which is admittedly more difficult to deal with than lower-level jobs. A recent report by The Carnegie Council on Policy Studies in Higher Education on affirmative action in higher education states:

> In certain respects, the academic job market is unique, especially when compared with job markets for most white-collar and blue-collar workers. *It is not quite so unique when compared with markets for specialized professional and managerial workers in government and private industry.* (emphasis added)[15]

Neither the legislation nor the courts would support any separate set of standards or an exemption for professional employees.

Any attempt to exempt academia from the Federal regulations and statutes that prohibit discrimination would deprive women and minority faculty of the fundamental civil rights now enjoyed by all citizens of this country. It would be the first step backward in civil rights legislation, and it would set a dangerous precedent for other segments of society seeking exemption from these laws. Moreover, the Congress specifically rejected the notion that academic institutions should be treated separately from the rest of the country when it amended in 1972 Title VII of the Civil Rights Act of 1964, by deleting the exemption for educational institutions. Nothing in the legislative history of the 1972 Title VII amendments, or the Equal Pay Act amendment to cover professional employees (i.e., faculty), would support any exemption or different treatment for educational institutions. To the contrary, the passage of these laws and others to cover educational employment clearly indicates the opposite. The Senate Labor and Public Welfare Committee report on the Title VII amendments stated in 1972:

> As in other areas of employment, statistics for educational institutions indicated that minorities and women are precluded from the more prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs. . . . The Committee believes it essential that these employees be given the same opportunity to redress their grievances as are available to other employees in the other sectors of business. Accordingly, the Committee has concluded that educational institutions, like other

[15] "Making Affirmative Action Work in Higher Education: An Analysis of Institutional and Federal Policies with Recommendations," A Report of the Carnegie Council on Policy Studies in Higher Education, August 1975, (p. 3-3 of advance copy).

employers in the Nation, should report their activities to the Commission and should be subject to the Act.[16]

Other Solutions: The Pitfalls of Arbitration and Mediation as Alternatives to the Federal Presence

Some persons are now promulgating the use of arbitration or mediation to handle discrimination complaints in academia. Typically, arbitration is not so much concerned with the principles of redress of grievances or inequities, as with *working out a compromise position* between two adversaries. The rights of the individual and due process are not absolutely essential to arbitration procedures; moreover, arbitrators are not required to follow Federal standards concerning discrimination or court-derived principles in working out solutions. For example, an arbitration panel would not need to follow the definition of discrimination articulated by the Supreme Court in *Griggs* v. *Duke Power Co.*, [401 U.S. 424 (1971)], or the long-articulated principles of equity. In the event that these standards and the concepts of constitutional due process which are now assured in all other forums involving discrimination were to be incorporated by law into a mandatory arbitration procedure, then it is not clear how the arbitration process would be very much better than the conciliation process already available under Title VII. The Equal Employment Opportunity Commission requires that all complaints, upon a finding of discrimination, be conciliated. Should either party be unhappy with the conciliation proceedings, the courts are available. In contrast, any kind of binding arbitration would almost wholly bypass our court system and would probably rule out all class complaints and complaints concerning *patterns* of discrimination.

If a mediation-arbitration procedure was required of all academic discrimination complaints, it might well create a separate class of citizens: *those with discrimination complaints in academia would have one set of procedures,* and *the rest of the country would have another*. In effect, academic women and minorities, as well as academic men claiming reverse discrimination, would have *less* protection under arbitration than they do now. There would be *no right of appeal* nor *any body of previous decisions to fall back upon.* Moreover, unless the procedure was required *by law,* it might not be binding on women and minorities, for as the Supreme Court recently ruled in *Alexander* v. *Gardener-Denver Co.*, [415 U.S. 973 (1974)], a union contract requiring arbitration does *not* bar an employee from using Title VII machinery. Employees are not prohibited from filing charges of discrimination against their employer (or union), *even if an arbitrator has rejected their claim.* Thus, an employee is not bound to use contract grievance machinery in instances involving discrimination, nor is the employee (in contrast to the employer) bound by an adverse finding of an arbitrator. Justice

[16] 118 Cong. Rec. §2277, Feb. 22, 1972.

Powell, who delivered the unanimous decision, stated that while the arbitrator's opinion may be entitled to some weight as evidence in the employee's Title VII claim, it was the Federal courts and not the arbitrator that would have the last word.

Whether universities would agree to a procedure that is binding upon them but not on the grievant is questionable. Unless the grievant felt that he or she would get fairer treatment from an arbitration procedure than from the courts, there might be little incentive to use it, particularly if the principles on which it would base its decision are unknown and likely not to be as beneficial (from the grievant's standpoint) as those that could be obtained by EEOC and the courts. While there might be economic incentives for a grievant to use arbitration in preference to taking one's own suit to court, grievants now have the option of allowing EEOC to handle the complaint, with its power of requesting an injunction and using its own attorneys at no expense to the grievant in a court case. The large backlog in EEOC cases, however, might make arbitration more attractive in terms of possibly speedier redress.

In addition to individuals giving up their statutory rights, arbitration might also conflict with collective bargaining procedures: Individuals who were involved in union contracts might have to choose between their own required arbitration procedures and those set up for discrimination problems, or perhaps a person who simultaneously claimed discrimination *and* violation of union procedures would have to become involved in *two* sets of arbitration proceedings.

Any type of binding arbitration procedure written into law to cover academics could open up a new series of court cases involving its relationship to Title IX, Title VII, the Equal Pay Act, Executive Order 11246, the Civil Rights Act of 1866 and 1871 (Sections 1981, 1983, and 1985), the National Labor Relations Act, and the 5th and 14th amendments of the Constitution. Would the rights of individuals under those forums be suspended? Would women and minorities choosing an academic career have *less* or *different* rights from citizens choosing other types of employment?

Another Alternative: Grievance Procedures

Grievance procedures suffer many of the same disadvantages as arbitration and mediation. Although not required under the Executive order or Title VII, the regulation for Title IX requires institutions receiving any form of Federal assistance to develop grievance procedures.[17] Individuals, however, are not required to use the grievance procedures, nor are any standards given other than that the procedures should provide for "prompt and equitable resolution."

[17] Section 86.8(b) of the Title IX regulation reads: "A recipient shall adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part."

While there is general agreement that good grievance procedures are essential to good management, there is disagreement as to whether or not Federal policy should *mandate* that such procedures be used by *all* complainants *prior* to filing a charge with the Federal Government and/or prior to the Government's response to a charge. Women's groups generally claim that without well-articulated standards to ensure due process and equitable handling of complaints, grievance procedures may be biased and/or in large measure—if not totally—controlled by the institution with little or no input from those affected by the grievance procedures. On the other hand, institutions are not likely to view kindly any attempt by the Federal Government to set standards for grievance procedures.

One of the problems with grievance procedures is that recommendations of a grievance committee are rarely binding on the chief administrator of an institution; women's groups give numerous examples of situations where recommendations favorable to a woman faculty member have been overturned.

If separate procedures are set up *only* for discrimination, apart and separate from other procedures to handle employment problems, then complainants will have to categorize the reasons for alleged unfair behavior in order to determine which forum to use. For example, a denial of tenure, if thought to be discrimination, would necessitate one set of procedures. If the same denial of tenure was characterized as unfair for other reasons, then a different set of procedures would be utilized. Clearly, one set of campus procedures is needed for all employee complaints.

Another important criticism is that neither arbitration nor grievance mechanisms deal with the root problems of systemic discrimination, class patterns, or policies and practices that have a disparate effect on women or on minorities but deal with individual problems instead.

Conclusion

In summary, affirmative action is coming under a good deal of criticism, partly because it has been badly administered and partly because some administrators have misunderstood the Federal requirements. It would be tragic for the rights of citizens in this country if we confuse poor administration with imperfections in the law itself.

The academic community is one of the most powerful in this country—not because of money or direct power, but because it is responsible for training the youth and leaders of America. If women and minorities are to have the birthright that is that of their white brothers, they must have the opportunity to partake in the fruits of higher education as students, as staff, as faculty, as administrators. To weaken *any* of the laws that protect them from discrimination, particularly those that affect education, would be a serious abrogation and denial of the rights of women and minorities.

The legislation that prohibits discrimination on the campus is very new. We had all hoped that with the passage of these laws that prohibited discrimination on the campus a new era had begun. But already, within a few short years, the backlash has begun and attempts to weaken laws and regulations are well underway.

At the same time that many people are critical of HEW as being inconsistent and unable to understand academia, the same persons are recommending that the main agency to deal with discrimination in academia be *HEW*. Some women's groups interpret this as an indication that some would prefer HEW because it is most likely to be the weakest of all the enforcement agencies. Whether this is true or not is unclear; however, of all the agencies involved, HEW is most prone to respond to pressure from academic institutions, so women's groups are somewhat concerned about the rights of individuals in those circumstances.

Backlash is also increasing and can be expected to continue to do so as the economic crunch continues. Hearings generally viewed by women and minorities as unsympathetic were held by Rep. James O'Hara in 1974.[18] Some administrators of academic institutions are increasingly utilizing their informal and formal contacts to press upon the Department of Labor and HEW for more "reasonable" regulations and guidelines. The Carnegie Council's report,[19] while containing some worthwhile recommendations, also contained many that were viewed by women's groups with dismay, such as amending Title IX so that it would not cover employment, requiring less data for colleges than from other segments of society, exempting tenured positions from numerical goals, etc.

The backlash, while undoubtedly related to budget constraints[20] and to the long history of academic independence from Federal restraints, is also related to the fact that women's issues are the major area of focus in higher education. Indeed, one of the major differences between academic discrimination and that in industry is that the issues in academic employment have been focused far more heavily on women's issues than on minority issues. HEW became involved in discrimination issues on the campus not because of liberal support for minorities or because of substantial minority pressure; it came about because women filed charges against universities, and when the Government comes in it examines discrimination not only against women but against minorities as well. There is a "critical mass" of women on virtually every campus in the country—enough women to raise issues and press for change. It is this fact—the sizable numbers of women already on each campus as students, staff, and faculty—that may account in part

[18] Hearings before the Special Subcommittee on Education, *supra* note 14.
[19] *Supra* note 15.
[20] Women and minorities generally make the most progress during an expanding economy when there is a labor shortage, as in a war.

for the greater resistance of academia when compared to that of industry: It is difficult for some persons to accept the fact that at some point women could indeed "control" an institution. Even if discrimination based on race and national origin were to end at all levels of education, it is not likely that minorities would ever occupy much more than 15 to 20 percent of the academic positions in the country; in contrast, women could potentially fill *half* of the positions. Many men are unconsciously or consciously worried about their relationships with their wives; there is literally one of us "in every house." Thus the "threat" of women "taking over" may be far more anxiety-provoking to some men than the threat of minorities.

There has been little overall evaluation of the changes affirmative action has wrought and how these changes have affected the academic community. What is known, however, is that litigation is increasing—complaints not only by women and minorities but also by white males claiming reverse discrimination. Harassment of those who file charges is also increasing, and many persons who have filed charges have faced professional isolation, derision, and hostility. At an injunction hearing for a woman scientist, male members of her department had to be escorted from the courtroom at the judge's order because of their heckling.

Discrimination on the campus has existed for a long time, and it was *only* through *new* laws and *pressure* that change has occurred. Institutions, like people, tend to react to pressure more readily than to mere moral exhortation. Certainly the fear of legal suits played a major role in making many institutions become "committed" to raising women's salaries. And it was the concern *about HEW* that made many institutions aware and "committed" to end discrimination. Laws and social change go hand in hand, and generally it is far easier to change laws and behavior than it is to change attitudes and feelings. Women and minorities who have seen the hurts that discrimination brings want changes in policy, practices, and behavior and care little whether the changes occur because of laws, or pressure from advocacy groups, or moral commitment.

In the next 10 years, virtually every educational institution will face two major issues: the budget crunch and discrimination. Women and minorities are asking for a total evaluation of all campus policies and practices that have a disproportionate impact on women and minorities. The changes will not only be good for those groups but for *all* people. I am reminded of one institution which finally allowed part-time, tenured faculty. The first person to request a part-time assignment was a white male who wanted to spend some time writing and still keep a finger in the academic pie. What had started out as a "woman's issue" led to a more flexible policy which benefited all members of the institution.

The women's movement has the potential to truly humanize academia, and administrators who truly care about their institutions would be wise to use women and minority issues as a lever for change to make the academic community a truly humane place.

Affirmative action at its best requires:

> the revision of standards and practices to assure that institutions are in fact drawing from the largest marketplace of human resources in staffing their faculties and a critical review of appointment and advancement criteria to insure that they do not inadvertently foreclose consideration of the best qualified persons by untested presuppositions which operate to exclude women and minorities.[21]

At its worst, affirmative action is a plethora of myths and misinterpretation, inefficiency by HEW, and a lack of knowledge on the part of administrators, etc. Yet despite all the complaints and criticisms, it is interesting to note that *not one institution has ever had funds withdrawn or terminated because of discrimination. Not one institution has ever had new contracts delayed because of discrimination,* although some institutions have had delays because of a lack of an affirmative action plan. *Not one institution has ever requested a hearing* under the Executive order. *Not one institution has ever had funds terminated, withdrawn, or delayed because of its failure to meet numerical goals. Not one charge of a pattern of sex discrimination filed with HEW has ever been refuted.*

The problems ahead of us are tremendous, and the first blush of enthusiasm and optimism may well be over for those of us involved in the activities of the last few years. We have made enormous progress in terms of legislation and in terms of awareness, and we have begun to change actions on the part of many.

Women are the fastest growing and potentially the largest advocacy group on the campus and, indeed, in the Nation. They are banding together on individual campuses, at the statewide level, within particular disciplines, and across the Nation. They are building coalitions with minority groups.

Let me close with a newly discovered "revelation" from the Bible, discovered by a woman archaeologist and which characterizes the new mood of women on the campus:

> *And they shall beat their pots and pans into printing presses;*
> *And weave their cloth into protest banners;*
> *Nations of women shall lift up their voices with nations of other women;*
> *Neither shall they accept discrimination any more.*

This may sound apocryphal, but I suspect it may yet prove to come from the Book of Prophets. For what women are learning is the politics

[21] "Affirmative Action in Higher Education: A Report from The Council Commission on Discrimination," *AAUP Bulletin,* Summer 1973, p. 178.

of change; they have learned that *the hand that rocks the cradle can indeed rock the boat.*

CHAIRMAN FLEMMING. Thank you very much, Dr. Sandler. I might ask if either Dr. Sowell or Dr. Roche have arrived yet?

[No response.]

CHAIRMAN FLEMMING. Apparently not. So I am going to recognize those who are here to react to these papers and suggest that at this point you confine your reactions to Dr. Sandler's paper. If you do not have any reactions to Dr. Sandler's paper, of course you will have the opportunity of reacting to the other papers a little later on in the course of this consultation.

I will recognize first, in the order in which they appear in the program, Dr. Miro M. Todorovich, who is the coordinator of the Committee on Academic Non-Discrimination and Integrity.

DR. TODOROVICH. I did assume that the presentations would be in the order of the program. So my comments did assume that Dr. Sowell would have given his presentation before I reacted. So, if someone else here is ready to react to Dr. Sandler's presentation, they may go ahead.

CHAIRMAN FLEMMING. Okay. Dr. James C. Goodwin, who is the assistant to the vice president-university relations, University of California at Berkeley.

DR. GOODWIN. I am afraid I am in total agreement with Dr. Sandler's position, and I have some other views to support that position.

CHAIRMAN FLEMMING. Do you want to present your views in support of that position at this point, or would you like to wait and react to comments by Dr. Sowell and Dr. Roche?

DR. GOODWIN. I would prefer to wait because my remarks really are centered mainly around Dr. Sowell's presentation.

CHAIRMAN FLEMMING. All right. Fine. I recognize Dr. Manuel H. Guerra, who is the professor of bilingual-bicultural education at the New Mexico State University.

RESPONSE OF MANUEL H. GUERRA

DR. GUERRA. Mr. Chairman, I find myself in the same position as the gentleman from Berkeley. I, too, have concurred largely with the presentation of Bernice Sandler, and many of my remarks also are directed to the paper of Dr. Sowell. However, there are two or three things I would like to bring out, perhaps to the benefit of my colleagues who will succeed me here.

For example, I think affirmative action as she has very well described it in terms of her concern for women and minorities really requires affirmative conviction, and I think that the essence of everything my colleagues and I are going to say in our reactions is going to bear out what has been said already yesterday and this

morning: that there are two fundamental positions that are being defined very well by the various participants.

One has to do with a firm conviction concerning the realities of adverse conditions in academia and in society today. On the other hand, a concern with their machinery and the instrument of improving those conditions, the procedures, and the means. I do not always agree with Bernice on this point.

I just take this little exception with her paper, that all academics today admit that there is discrimination. On the contrary, I think the very fact that they are more concerned about reverse discrimination and a backlash in rebutting the decisions and the inquiries and rebutting the scholarly articles that are appearing in quite a number of different journals today, I think indicates that they are not really convinced.

I think there is great disparity between the middle class and the very conservative tradition we have in academia in America today and the social conditions in our ghettos and throughout the Southwest. I do want to call attention to the fact that there are some cultural differences that have to be accounted for.

As a trustee of a foundation granting scholarships to young women, Chicanas and Mexican Americans, it is very difficult in the whole culturalization thing to be able to convince parents with a different cultural lifestyle that children must leave home to continue their education and have their encouragement even when the foundation is subsidizing that educational opportunity.

There are cultural attitudes that come into play here, and I want to address myself to the papers of these other gentlemen concerning them. However, I think of the diversity of the American public that we are talking about, and I don't like to use the word "minorities" for that reason. It has to be conjugated in identifiable terms—the Puerto Rican here in the East, for example, or the Jewish community, or the Polish community, etc.

In the Southwestern States we talk about the Mexican American, the Native American Indian, and many other societies; the Japanese and Chinese in San Francisco. We are talking about 20 million Spanish-speaking Americans, and we are talking about 15-1/2 million Mexican Americans who speak Spanish—actually around 65 million Americans that are bicultural and/or bilingual. Of these, there are 45 million that are both bilingual and bicultural.

I just want to state here at this point that I certainly concur with much of the paper of Bernice Sandler because the original distinction I made of the conflicting philosophy and rationale conceptualizes this entire question of affirmative action. The question is whether or not adverse conditions in American academia and the traditional problems of that academia are real.

It they are not a myth, if they are not an exaggeration of people but indeed real, they will demand effective instruments of government

intervention to help institutions working together as partners to bring about equal educational opportunity; that seems to be the great challenge of this conference.

I am not convinced at all—perhaps Bernice is—that in academia everybody shares this conviction. But I assure you that most of the bicultural Americans that you talk to do—in Arizona, the Navajo and Apache societies; in California, Orientals in San Francisco; Mexican Americans in the Southwestern and Midwestern States. I am constantly aware of the diversity of the problem, and I am constantly aware of the disparity between the concepts and outlook of traditional academia of my colleagues and the problems of our inner cities and barrios.

CHAIRMAN FLEMMING. Thank you very much.

Dr. Borgatta, distinguished professor at Queens College, City University of New York, do you want to begin your part of the dialogue now, or do you want to wait?

RESPONSE OF EDGAR F. BORGATTA

DR. BORGATTA. I think I can begin the comments that I have because they are directed to Dr. Sandler, although I must say I will move a little bit afield as I go along. I hope that Dr. Sowell arrives and presents his materials because I found them extremely persuasive.

On the other hand, I found some things in Dr. Sandler's presentation a little bit uncomfortable, and I want to suggest why this occurs. In part I found that a number of the pieces of information that she provides are not relevant in just the ways that Dr. Sowell suggests that information should be made relevant, and that is by taking various factors into account when there is a consideration of preferences. But I think that I would like to refer specifically to a few of the comments and say that I have some impressions that are a little different from hers.

For example, relative to the question of the operation of the so-called "old boy network," Dr. Sowell seems to present a quite different picture of how it operates and suggests that, indeed, while there may be such a set of procedures that can be labeled in that way, that they may not really penalize women and minority groups. I think, to some extent, she has to address herself to pieces of that information because the "old boy network" tends to be a glib phrase just like so many other glib phrases are that we have, that we use in our language.

I am extremely uncomfortable with her materials because I find that she draws conclusions that other people might not. For example, in her quotation from the Supreme Court, I think she appears to find justification for numerical goals. I read the same document and I do not see any necessary indication that one must go in the direction of numerical goals. That there are certain procedures that are involved, that should be involved, certainly is implied. But I don't see that the means that have been highly criticized are implied.

Now, relative to the criticism that sometimes has been directed and the distinction she makes between the so-called industrial model and the model sometimes advanced as the model of the academic situation, I think the problem there is that there is an assumption that there is nothing wrong with the industrial model. I think many of us, on the other hand, would criticize the industrial model very severely. If I may, I would like to give you an example of the industrial model, and this is, this particular model, is taken from a *New York Times* report.

This is relative to the report on March 21, 1974, on the trucking industry. Under a consent decree filed by the Department of Justice in the Federal district court in Washington, seven big companies agreed to a goal of filling 50 percent of vacancies and new jobs with blacks and Spanish-surnamed applicants in communities where those groups make up more than 25 percent of the working-age population. Further, it was expected that 342 smaller companies named in the lawsuit, along with the International Brotherhood of Teamsters and the International Association of Machinists, would accept the consent decree.

But now, clearly, the only way that you can achieve a numerical goal of 50 percent under the circumstances that occur is through preferential hiring, and presumbly use of preference is illegal if one takes into consideration the tradition of the Supreme Court in the application of the equal protection clause. This does not mean that all courts at this point in time are operating under that particular mandate.

Now, notice what happens. Suppose that some person who might be a white immigrant here at some period of time feels he has a complaint. To whom can that person bring the complaint?

Well, we can probably write down some agencies to whom it could be brought. But think of the structural situation. The court has already been involved in that particular decision. The law enforcement, Federal enforcement, agency has been involved. The companies have been involved, and the unions have been involved. Who else is there to protect the rights of the individual?

Well, possibly one can turn to the American Civil Liberties Union, except the American Civil Liberties Union is on record as saying that where benign quotas exist in the face of prior histories of discrimination they will not interfere.

So, if we are concerned with what are called the rights of individuals under the Constitution, we have disenfranchised some persons by that particular procedure. Now, it is in that consideration that I would say that any translation of that model to the academic mode is objectionable, so I don't think that what we are doing is quarreling about whether a model is coming from one area to another. But we are quarreling about the assumptions that may be involved in that particular model.

With regard to the question about where the policy arises, which was not detailed in her verbal presentation, we may also quarrel just a bit in terms of what policies and who should make what policies. I think the

first thing we have to pay attention to is that the policies are not supposed to be made by courts. Policies should be legislated, and then the courts should tell whether people are corresponding to that policy or not.

Many of the things which are occurring today are effectively at intermediate levels of the courts, where judges are determining policy. So some of these things will be challenged at two levels. One, the legislative and, subsequently, when these things come up to the Supreme Court, and I should mention that many of the issues that we are talking about have not come before the Supreme Court.

Now, what about the sources? The sources are interesting. The courts are not unanimous in terms of their opinions. Certainly, at the lower, below the Supreme Court, level you cannot speak of unanimity; but there are other sources. For example, HEW, more generally, is given as a source of policy. How HEW arrives at some of its policies really baffles me.

If I may, I would like to pick one specific example which I think has to be pinpointed in what it means. There are fellowships which are supported by HEW through one of its agencies and are offered through the American Sociological Association and other professional associations. Eligibility to these fellowships is restricted to, and I will quote: "American citizens and permanent visa residents who are blacks; Spanish speaking; that is, Chicanos, Puerto Ricans, Cubans; and Native Americans; that is, American Indians; and Asian Americans; that is, Japanese, Chinese, Korean, Filipino, Samoan."

Now, obviously, here are Government-financed fellowships, and they are not open to all comers but are open to people only on the basis of racial, ethnic, or national criteria, something that many of us thought would be clearly forbidden by constitutional precedent in the courts. Apparently, however, if HEW is paying for the lucrative fellowships, there cannot be anything wrong, and the professional associations have been happy to administer them. I would have to say that this may be directed toward setting things right, but it is a form of racism. It does exist in HEW. It is there and quite obvious. I don't know how it can be justified. I am sure some people will do it.

Now I would like to point out a little inconsistency in saying that what we are concerned with is what the law is, and then suggest that one should look only at how it is in an ideal sense, not how it occurs and how it is implemented. As I understand, and I was not here yesterday, Ms. Harris made a presentation in which she suggested that under certain circumstances preference should be given to individuals, that different standards should be used in judging individuals. Similarly, today, I think it was Dr. Pollock who said that under certain circumstances she felt that two sets of standards should apply. And what were those standards? Those standards are explicitly stated in terms of circumstances where presumed goals could be demonstrated

to be appropriate on the basis of some statistical analysis of supply. Well, she is illustrating the problem, the very problem that exists by the position of a suggestion that there is nothing wrong with goals, when apparently somebody on the podium will use them explicitly in the ways that presumably are prohibited.

Now, the other question that arises that is very much of concern to individuals is the type of view that we have of the academic institutions. Now I happen to have had my own experiences. If anybody wants to hear about what my background is, I would be glad to tell them about my childhood and all these other things. But the fact of the matter is I have been in universities and I have seen many things that have been wrong with them. But I find it very difficult to view them as evil and having some conspiratorial policy which is designed to keep particular individuals down. I have not had this type of negative, strong experience, nor have I seen it in many of the institutions that I have visited.

I have occasionally come across examples of it as I have come across examples of other things. In fact, I would like to suggest that one of the possible differences between the so-called industrial model and the academic institution is that the academic institutions are different on class and on other bases in such a way that they are favorable to many things that we put in labels as liberal, as egalitarian, and such other things. Certainly, we have our conservatives on campus, but I don't think that the instituions of higher learning represent what we would call the backward-looking centers of our society. In fact, I would like to give a little piece of experience which is evidence of what I have in mind.

For example, there was a small debate among sociologists that was caused by the printing of information on the basis of a report by an HEW representative of some cases of reverse discrimination. One of the questions that was raised was whether reverse discrimination does exist on the campuses. Research to get at this type of question can be devised fairly easily. Sociologists have ways of asking questions, as do all social scientists. I designed a small research [study] which was published subsequently in the December 1973 *ASA Footnotes* under the title, "Affirmative Action in Action." Now, following a quotation from Bernice Sandler concerning the illegality of giving preferential treatment to minorities and women, a small number of questions were asked on experience in hiring. In spite of the fact that to answer in the affirmative to the following question required admission to an illegal action, over 40 percent of all respondents, chairmen and staff members, as sampled in departments, answered in the affirmative: "During the last 3 years, has any candidate been sought out preferentially (noncompetitively) because of sex, race, national origin, or other arbitrary characteristics (assuming, of course, the person was presumed to have acceptable qualifications as a sociologist)?"

The point was that the question focused specifically on the matter of preference and noncompetitive hiring. Other questions were equally revealing of high proportions interpreting affirmative action to mean giving preference, and a high proportion of persons were willing to give preference.

Such dispositions are reported and replicated in totally independent research by Barbara R. Lorch of the University of Colorado at Colorado Springs. One may draw whatever conclusions they like out of this type of information, but the conclusion I would like to point to is as follows: The climate that I see in institutions is one for support of appointments of women and minorities, even to the extent of being more than just favorable, but being willing to appoint even when you have to give preference, which is, as we indicated, illegal.

I just want to note that I think that as time pases we may find that some of the things we have done are going to be embarrassments because it is easy to rationalize sacrificing particular principles in order to achieve immediate goals.

I am reminded of the psychiatrist who deals with a patient. It would be very easy if the psychiatrist could cure the patient by changing the patient's life history. That is not what we have available to us, and so we should face reality in terms of maintaining the system that we have and altering it within the context of the system of principles that have been important to us. And I would maintain that the equal protection clause is crucial to this.

CHAIRMAN FLEMMING. Thank you very much.

Dr. Gertrude Ezorsky is professor of philosophy at Brooklyn College, City University of New York.

Dr. Sandler has presented her paper. The other two persons who are to present papers have not done so as yet. They will be given the opportunity and will be doing that fairly soon. Your fellow panel members, in terms of reactors, have been commenting just on Dr. Sandler's paper. Some of them have to wait until the other two papers have been presented until they make any comments. And then in two instances comments have been made on Dr. Sandler's paper. We would be very happy to have you follow whichever course of action makes you feel more comfortable. If your comments are centered around Dr. Sowell's paper or Dr. Roche's paper, in addition to Dr. Sandler's paper, then you might want to wait until those papers have been presented.

DR. EZORSKY. My remarks deal exclusively with Dr. Sowell's paper. I might say I thought Dr. Sandler's paper was superb.

CHAIRMAN FLEMMING. Fine. We will have a presentation from Dr. Sowell and Dr. Roche and then have further comments.

I now turn to my colleagues to see if they have questions they would like to ask based on the discussion up to the present time.

DISCUSSION

VICE CHAIRMAN HORN. Dr. Sandler, I enjoyed your paper. I note in my marginal notes that I gave you 10 "right-ons" and only two "baloneys," which is a very high score for the papers I review.

Let me, if I might proceed through your paper and ask you some questions, just so I can clarify in my own mind some of the very interesting issues that you raise. First, where you talk about goals and underutilization and you mention the figures for psychology nationwide, where 23 percent of the women do have the terminal degree; that is, 23 percent of the doctorates in psychology are possessed by women. And therefore, following your argument, it would not be unreasonable in a department of psychology in a college or university, that they could set a goal, let's say, over a 5-year period, of trying to achieve 23 percent utilization of women who hold a doctorate. Now, you have read Professor Sowell's paper, I believe?

DR. SANDLER. I am sorry, I have not. It was not distributed before this meeting.

VICE CHAIRMAN HORN. He points out in his paper that there are not only field differences where women seem to go largely into selective fields, but there are also subfield differences within a field. In this case you have talked about psychology, and as you know, there are various aspects that are more quantitative than others. My inquiry to you is: Given the situation in American higher education where you have a plateauing of additional faculty and your new hires are based largely upon death, retirement, and other chance factors, in a 5-year period with imbalance in subfields, do you really think a target based on the percent of women that possess the terminal degree in the field is a realistic target?

DR. SANDLER. I think there are not going to be 23 percent openings in the department. So there is no way that is going to happen. I think your point is a very good one because in psychology women are more likely to be in clinical than in experimental psychology. But I think what does happen depends on the department. If the department has a heavy emphasis on the experimental, their goal for women in terms of availability will probably be less than 23 percent. On the other hand, if it were clinical people they were looking for, and some departments have a heavy emphasis there, then it might be more than 23 percent.

We find an interesting schizophrenia among some of the critics because you find people saying we need very precise availability data to break down subfields such as clinical and experimental psychology. On the other hand, you get the same people saying we ought to be combining fields when we develop goals, so that psychology and sociology would be thrown together, for example. And there is a great muddying, and people are not very clear, really, as to what is the best way to do it.

What you suggest would be perfectly legal and perfectly appropriate in terms of a department saying, "We are looking for a clinician or we are looking for an experimental." The numbers are not exactly 23 percent for both.

VICE CHAIRMAN HORN. How do you personally feel about that lumping of various social science disciplines together and using that as the target?

DR. SANDLER. I have problems with it, particularly in large institutions. In smaller institutions, where you are talking about a department of two or three people, it is a different thing. But in a large institution you get rid of any accountability for a department when you lump it together with others, and average things out: You might have a psychology department that did extremely well; they recruited and were able to find and hire qualified women. On the other hand, the sociology department might have some people in it who still feel "women get married" and "are not productive" and "women are not as good." That department makes very limited effort and is unable to find any qualified women for any opening that they ever have over a 5-year period. If you average the two departments together, you could not tell what was going on in a particular department.

VICE CHAIRMAN HORN. My next question is where you cite the National Academy of Sciences' report that unemployment of women with doctorates in science, engineering, and social sciences is more than four times as high as the unemployment rate of their male colleagues, specifically 3.9 percent compared to 0.9 percent.

Now, in Professor Sowell's paper he makes the argument that one of the problems here with data such as that is that the factor of marriage has not been taken into account for women who might well possess a doctorate but have made a choice on their own or their husband or spouse has made the choice with them, and it is not the employer's choice. How do you react to that argument?

DR. SANDLER. I have not seen the data you are talking about, so I am not really comfortable responding to his data. There are some women who cannot move because of marriage, but also there are some men who can't move. A man who says he is not going to take a job in California because his daughter is in high school and he doesn't want to move her doesn't enter into those kinds of figures. There may also be different age differences involved, but I cannot respond to that question more specifically.

CHAIRMAN FLEMMING. Professor Ezorsky has a comment.

DR. EZORSKY. In terms of academic women subordinating their careers to men, it has to be taken into account as to whether or not the man is offered a better job than the woman. If the man is offered a job at Harvard and the woman is more qualified but is offered a lower-paying job, it is quite likely that the man's choice tends to dominate where they live.

VICE CHAIRMAN HORN. Thank you.

Now, Dr. Sandler, you say quite correctly, I think, and I completely agree with you on this, that affirmative action improves the quality of decisions within the university that deal with personnel and sets an implicit process where one has to justify in writing the decision that one makes.

Now, one of the things that grows out of those paragraphs I would like to ask you your reaction to this: Is there a problem with the trend toward collective bargaining in many institutions where there is an emphasis on seniority and not merit, that those that are already into this system—largely the white male, if you wish to generalize—will always be ahead of those that are being recruited as a result of affirmative action goals, namely, minorities and women, because of the emphasis under seniority on automatic promotions based on longevity, rather than the considerations of merit, which would enable minorities and women to surpass on the academic ladder many who are already ahead of them? I just wonder how you feel about that problem and argument.

DR. SANDLER. This is an issue happening now on many campuses, even without collective bargaining. It is a problem that goes well beyond academia and deals with the whole issue of seniority and terminations, and it is one being litigated in the courts now. We have had conflicting decisions in several circuits. We simply don't know at this point what the Supreme Court will rule. I think the Supreme Court has agreed to hear one of the seniority cases. In any event it is an issue that goes well beyond academia.

CHAIRMAN FLEMMING. Dr. Goodwin?

DR. GOODWIN. Few developments in American higher education have caused as much consternation, anxiety, and frantic activity as the advent of faculty collective bargaining. Opinions within the academic community remain highly polarized. Some denouce faculty unionism as a blight leading inexorably to a wholesale transformation of academia, undermining the character of the American university, shattering the shared-authority model of governance, tarnishing academic professionalism, destroying the last vestiges of collegiality.

Others, no less fervent, view faculty unionism as the sole means for defending the legitimate interests of beleaguered faculties and for preserving the essential values of the academic community against further encroachments by accountability-minded politicians, arbitrary administrators, cost-conscious trustees, affirmative action officers, and students bent on equal participation in academic policymaking.

From the point of view of affirmative action advocates, collective bargaining in higher education enshrines seniority over quality. It also would give away some of the hallowed ground now held by a portion of academia in the debate over individual merit versus group standards. It is hard to imagine a group standard more inflexible than that embodied in the rank and file.

VICE CHAIRMAN HORN. Thank you. Now moving on, Dr. Sandler, where you mention grievance procedures, I don't know if it is so much of a question. But I would like to make a comment on that. I appreciate the argument you made that the recommendations of the grievance committee are rarely binding on the chief administrator of an institution and that women's groups give numerous examples of situations where recommendations favorable to a woman faculty member have been overturned. I take it from that you are advocating binding recommendations by faculty committees; or are you?

DR. SANDLER. Well, the problem is we need some sort of binding recommendations if we are going to have a good grievance procedure that works. If the procedure works, people will use it and accept it. If it is not going to work and if it is not binding, people will bypass it, which is what has happened in many institutions.

The women are going to court in droves, and I think that is sad and unfortunate. It is, in one sense, the worst way of settling their disputes, and yet it seems to be necessary in some instances because institutions don't have decent grievance procedures and the chief executive often rejects decisions. On the other hand, it can only be binding on the institution. It cannot be binding on the woman or minority because they still do have access to another process by going through judicial procedures.

VICE CHAIRMAN HORN. Many of your institutions have different legacies where, in some cases, the faculty attitude, regardless of the competency of the grievant in question, is that the faculty is always right, the administration is always wrong. When you have that attitude that does not stress merit and stresses only the fact that you are alive and breathing, hopefully, the institution, when it tries to upgrade quality, faces a real problem if grievances are binding by faculty committees who have not yet gotten the message.

DR. SANDLER. I think we are going to have an acceleration of grievance procedures and begin to develop better principles for how they should operate because the regulation for Title IX of the Education Amendments of 1972, which covers sex discrimination, requires a grievance procedure.

Now, the Government doesn't say what it should look like. It doesn't say people even have to use it. But it is an impetus for institutions to develop a mechanism. And I think those institutions that develop a good working mechanism will be in better shape than those that have legacies that make it difficult to establish a working procedure.

VICE CHAIRMAN HORN. Your comments on the hiring of women brought this question to mind, and I would like you to react to it. The charge is sometimes made by minority males that colleges are avoiding hiring them by hiring more white women, and then the charge is made by minority males also that it is not only white women, but it is also minority women who are being hired to the exclusion of the minority

male. What is your reaction based on your experience in looking at a number of colleges and universities?

DR. SANDLER. We have looked at some studies that look at minority females, and what was very interesting is that white males got the best jobs and at the most prestigious institutions. Then came minority males and Caucasian females. Then there was a gap, a big gap; then came the minority females at what they call "unranked" institutions, which means nobody wants to say they are bad. I think what happens is that when a minority woman gets ahead, she is terribly visible and everybody says, "See, she is there."

The question about minorities and women, and obviously minority women are in both categories, is one that has been of great interest in the last few years. And what is interesting to watch is that initially many minority people were concerned about the women's movement. They saw it as taking away resources, taking away interests that they felt they deserved. As time has gone on, we are beginning to see more and more coalitions between minority and women's groups. We see it on campuses, and we see it in Washington.

The extension of the minimum wage to domestic workers happened because the so-called "white professional women" got together and pushed for the same legislation that the minorities had been pushing for years. And with the women's movement, it was just enough extra to get that legislation passed.

I was at one campus and attended a meeting with women and minorities, and it was a startling meeting because there were faculty women, minority, and female, students and staff, black, white, brown. There were women and men who worked in the dining rooms. There were Cubans, Puerto Ricans. There were old women and young women.

What really struck me was, there was a young black woman with her Afro, with the torn jeans, and the whole thing—the way the young people dress—sitting next to a woman who I know was active in the DAR, a woman almost ready for retirement; and here were these two women sitting next to each other, talking about women and minority issues, and they were both, in a sense, scheming as part of this committee to figure out how to press on that institution, to make that institution give a better break to women and minorities.

We are beginning to see these coalitions form. I think they are coming, and I think they are essential because, if the women and the minorities don't work together but instead fight for the crumbs thrown on the floor, they will never get a chance to sit at the table.

And I think it is possible in the long range in this country to have women, who are 52 or 53 percent of the population, and that includes minority women, the minority men (that is another 6 or 7 percent)—add them together and that is almost 60 percent of the population in this country that is minority or female or both. And if you get that kind of

political power moving, you could really humanize this country in ways which we are only beginning to talk about.

VICE CHAIRMAN HORN. All right. Further on you made the statement, "Not one institution has ever had funds terminated, withdrawn, or delayed because of its failure to meet numerical goals. Not one charge of a pattern of sex discrimination filed with HEW has ever been refuted."

My query to you is: Are there statistics available on this with the names of cases that we could put in the record at this point, to try and get at this problem?

DR. SANDLER. You would have to check with HEW. It is very difficult to get adequate statistics from them.

I have one letter in my own files that someone sent me a copy of, a letter written to HEW about 2 years ago saying, "Send me a list of colleges charged with sex discrimination."

HEW's answer was, "We don't have a list. If you check with the women's groups, they will tell you which institutions have been charged."

They have since developed a list. I doubt its accuracy because I know of institutions that were charged that are not on the list. So it is not all that good. But I think you can get one.

VICE CHAIRMAN HORN. I want to stress that your statement here talks about a pattern of sex discrimination, not an individual filing of sex discrimination.

DR. SANDLER. Yes. Every time HEW has gone to a campus and come out with a finding, it has inevitably been a finding that says we find discrimination here, here, and here.

VICE CHAIRMAN HORN. I would like to see if General Counsel could get such information and insert it in the record at this point.

CHAIRMAN FLEMMING. All right.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

VICE CHAIRMAN HORN. Professor Guerra, as I look at many colleges and universities in California, the most underutilized group seems to be Mexican Americans, and the problem seems to start with the falling percentage of enrollment in many of these institutions of Mexican Americans at the undergraduate level; the problem being, if you can't get them into the pipeline to get them an undergraduate degree, how can you get them to the master's degree and the doctorate so that you solve the supply problem?

I wonder if this is your experience and if you have any suggestions for overcoming what I think is the group with the major underutilization in the State of California, where they are the major minority?

DR. GUERRA. That is an excellent question for anyone who is really very engaged in this particular area of concern. The problem is seen in the accumulation of the problems of the community through the

university. You cannot isolate in higher education problems that have community roots. You are talking about a society with some very specific problems.

There are disadvantaged societies. These are groups of people, Mexican American, Puerto Rican, etc; as you know, in San Francisco County Mexican Americans do not predominate, but rather Latin Americans do. And you also perhaps know that in California we have 2 million American citizens of Spanish-speaking background, predominantly Mexican Americans, who exceed the total constituencies of more than three States of the Union.

I think the underutilization problems can be very easily defined. The problem is, first of all, counseling. We have a tremendous counseling problem in our high schools. Many of these youngsters traditionally have never been counseled concerning programs that meet college requirements. Chicanos have not received good counseling because there has seldom been a competent needs assessment.

In a paper which I had described, in the three position papers of our authors, I pointed out, for example, that Dr. Roche has talked about admissions. And the Mexican American is entirely ignored by our authors. And Bernice, this is no reflection upon you, because you are committed to change, you are talking about minorities, and I am sure that you have this in mind. But under admissions, bilingual Americans have not been granted points for their language proficiencies in the institutions of the United States. And one of the most interesting things is the contradiction. The Modern Language Association of America for the last 5 or 6 years has become quite interested in bilingualism, and the whole profession has made an about-face and is now moving towards recognition of bilingual language talents.

The bilingual American who comes knocking at the door of a State institution has never had his bilingual assets accredited at that institution. For example, in California we have talked to the dean. A student applies for admission. He has good recommendations; he has made two "C" grades in very key courses that brought his record down to 2.75. The admissions officer tells us if he had a 3.0 average, he would have been admitted. We point out to him that this youngster has some real talents, very fine talents, that should be recognized.

For example, the youngster is proficient in Spanish and English. If the dean were to interview him in both languages, he would discover what traditional academia overlooks: bilingual proficiency. Indeed, this language proficiency, that the Modern Language Association of America, the college of liberal arts, and the Spanish department define as a qualifying criteria for the bachelor of arts degree, has been acquired at home.

And I am stating here for the record that one of the things I hope this conference will entertain will be the recognition of the bicultural assets that these disadvantaged Americans bring with them when they knock

at the doors of higher education, because we are always talking about *quality education* and academic standards and about qualifications of people.

I just hope that when it comes to an assessment of what those qualifications and standards really mean, I hope that we are talking about these cultural abilities in this particular area and that these language abilities will somehow receive the proper recognition that they deserve. Because when they do and when affirmative action concerns recognize the question, what is going to result will be higher standards and more quality education.

So, you see the counseling problem in California high schools is essentially a great problem. Then you have poverty; you have certain cultural problems, psychological problems in the Chicano and Puerto Rican communities.

We are dealing with another culture, another psyche. The value systems are different and, if Anglo sociologists do not recognize basic differences of language and culture of that particular society, we will not be able to understand what the problems really are.

Mexican American women have a great deal of difficulty being understood. They don't want to be Anglo models. They want to be Chicanas. They want to preserve their identity.

In society as a whole, you are dealing with certain cultural problems concerning higher education because cultural differences have kept people out. They have never been counseled. Their language assets have never been accredited. Their poverty has been perpetuated.

VICE CHAIRMAN HORN. Let me just ask you, Professor Borgatta, for the record to furnish the example you gave regarding the preferential treatment based on race, national origin, etc., rather than need and merit. And then I would like to add the HEW response to that, as to whether or not such a program is in accordance with the law.

CHAIRMAN FLEMMING. I gather you have that in your paper, do you not?

DR. BORGATTA. Yes. There is reference in my paper to that. But we can get copies of the announcement.

CHAIRMAN FLEMMING. If you will, just make sure we have a copy of your paper. And we will ask staff, then, to follow up on that and get the necessary information from the Department. And without objection, it will be entered in the record at this point.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

VICE CHAIRMAN HORN. Professor Borgatta, you mentioned, in passing, conservatives on campus and that led me to the thought that yesterday Professor Willie made the point that perhaps people of different cultural, racial perspectives could enrich various disciplines within the university in their search for truth because they bring this

different perspective. Do you feel that there should be a conscious effort to also assure ideological balance within the university?

DR. BORGATTA. I hope this does not ever become a criterion for getting first-class people in the biology department. I don't know that one's politics are relevant. If you are dealing with the problem of presentation of political persuasions in a department of political science, then I think you may be raising a relevant question.

VICE CHAIRMAN HORN. What I am saying is it would not be unreasonable to require, whether it be in political theory or economics or some of the social sciences, it wouldn't be inappropriate to have some diversity ideologically, I would think.

DR. BORGATTA. It depends on what you see as the department's perspective. I happen to define sociology as a science and I prefer that we should minimize using political orientation as a criterion if it is in any way possible to remove it.

VICE CHAIRMAN HORN. Then I would be interested in seeing your specific reaction to Professor Willie, that it is valuable in the university that people of different racial, cultural backgrounds be engaged in departments such as urban affairs, that they bring a perspective that cannot otherwise be gained.

DR. BORGATTA. I think Professor Willie may have a point—some people may have different experiences than others. But I would not take the position that I want to get a particular pattern of colors, styles, or anything else of this sort. My orientation towards academic selection has always been—and I have been involved in such matters—that we had to seek the best person.

VICE CHAIRMAN HORN. Thank you.

DR. GOODWIN. I would like to incorporate by reference some of the comments of Professor Willie yesterday. I thought it was a fine paper. I thought his point on diversity was essential both in terms of some of the things that I think are indicated by Commissioner Horn's comment, particularly in the wake of something like Watergate. But let me give you perhaps something today even more serious than that.

In a recent issue of the *Chronicle of Higher Education* there was a series of comments about the famous economics school at Harvard and the concluding analysis was as follows: "In the final analysis, too abstract a theory, too narrow a focus on one methodology, too uncritical an acceptance of economic laws or too specialized a structure of the discipline may all have contributed to the failure of economists to predict the present strange combination of inflation and recession."

What is really indicated is the kind homogeneity that creeps into what I call the "old boy school," and I will be willing later on this afternoon to document what I mean by "old boy school."

If you notice in Professor Sowell's paper, he presented no evidence to substantiate his concept that it ["old boy school"] does not exist. I have a lot of evidence that it does. And I would be willing to present it.

And this underscores it again: We don't even have a consciousness about Chicanos and Indians and Asians. Too often in these conferences the words "blacks" and "women" are the only words one hears. I find it rather frightening. I am also from California, but all these viewpoints are human, and they are terribly important because the crucial issue I see in higher education is a complete lack of moral competency. I will go into that heavily after this period is over. I assume we are going to adjourn rather soon?

COMMISSIONER SALTZMAN. Dr. Sandler, in this discussion conducted yesterday and today we dealt with the functions of administrative committees, the functions of faculty committees, and the functions of government, but we have not really hit on one area (and I am curious about the responsibilities and the impinging of that group on this whole scheme) and that is the governing boards of universities and whether they are public universities or private universities. Have you any comment in terms of their nature and their character; their absence from involvement in affirmative action programs; and their homogeneity as power groups, pressing upon administrative and faculty committees to restrict any positive and creative response in this area?

DR. SANDLER. I am not all that familiar with governing boards. So I cannot answer in the kind of detail I normally would like to. The power of governing boards seems to be shifting. In some institutions they seem to be taking a more active role. Generally, these boards are indeed quite uniform. There are few women or minorities on boards. There are a few States, I think New Jersey is one, which have statutes that say every public institution must have one or two women on its board. And, in Massachusetts in their public institutions they have made a very concerted effort to get women on the boards.

In a few States, board meetings have been held where board members are beginning to talk about women issues and what they as board members can do. But, generally speaking, the people on boards very often are not familiar with the problems at all. And it is an area that has not been looked at very much in terms of what boards can do.

COMMISSIONER SALTZMAN. Do you think it appropriate for this to be an area of investigation, especially in publicly-funded universities?

DR. SANDLER. That is one place where I would almost like to see a quota, where there should be some representation of women. If you have women in your school, you ought to have at least *one* woman on the board. We have institutions in my State with no or few women on the board. I think it is an issue that has not been aired, and it really needs some looking at. There was a small study that AAUW did about 4 years ago that looked at some of these things, but I don't know of any

study done recently to see what the numbers are. We really don't have up-to-date data.

COMMISSIONER SALTZMAN. Let me ask you a question relative to this statement in your paper: "Thus, if there were no women or substantially less than 23 percent women in a department of psychology, uderutilization would exist." Now my concern here is: Are you advocating a kind of parity that, if there is indeed 23 percent women in the psychology department, that 23 percent be on the faculty?

DR. SANDLER. No. I am not saying that. I am saying that is an indicator which raises a question, and then it becomes incumbent on the institution to answer the question: How come, if women are 23 percent of the doctorates, in this department of 20 people you have no women? And if the institution can then say, "Look, this is an experimental department, and we did all these things when we recruited, and here are the figures, and here are the qualifications, and Joe Blow is really better than Mary Smith, and that is why we didn't hire Mary Smith," etc., etc. And if an institution can document it, fine. The chance is such that even if there was no discrimination, there would be some departments with more than 23 percent and others that had less. It is not a hard-and-fast figure.

COMMISSIONER SALTZMAN. What I think I perceive is that you and Dr. Borgatta are not really talking about the same thing because you have pointed out that with respect to preferential treatment it is appropriate and legal only under circumstances where there has been a determination of prior discrimination; isn't that true?

DR. SANDLER. We are talking about the goal and the analysis of the work force. The underutilization applies to who is there now. If it looks like there is a problem, then you set a goal which says if we really go out of our way to get rid of discrimination and vigorously recruit and hire fairly, this is what we think we would end up with at some point, which is different from what we have now. I don't know if that answers your question or not.

COMMISSIONER SALTZMAN. What I am trying to get at is: Dr. Borgatta attacked preferential treatment. He said it was illegal, that there is an ultimate danger of tainting the goal with tainted means. However, you are saying you may only use those means when there has been a prior determination of discrimination practices. Isn't that right?

DR. SANDLER. Under the Executive order the goal is developed when there is underutilization, which in a sense raises a presumption of something having happened in the past. I would add that I am not too worried about most academics not being able—let me put it in the positive form. I think academics can learn not to give preference. I think academics can stand up and say, "Look, we are hiring the best qualified person, and we did all these things. We really tried. We

recruited widely and hired fairly and did it in good faith." I think this is possible. They are not forced to give preference.

COMMISSIONER SALTZMAN. Dr. Borgatta, would you like to respond to that?

DR. BORGATTA. Yes. Presumably, if we can specify a set of procedures which would lead to effective nondiscriminatory hiring, then presumably the consequences would be, if we have computed our goals properly, whatever corresponds to the goals at least in a statistical sense; that is, over departments and over institutions. If that is really true, then one has to ask the question, why one shouldn't specify the nondiscriminatory procedures only? Why does one have to go beyond that? Well, sometimes people say if you have a goal, then you have something to look at. Goals can be a little dangerous in this sense because they have been used quite politically.

For example, the American Sociological Association has a report on the status of women. The way one reads the report, it shows how women presumably are not being treated very well. If you put two tables together, however, to consruct a small, at least for a small amount of time, most recent time, analysis of the number of Ph.D.s who are produced relative to the number of new assistant professors in departments with graduate training, it turns out that the percentages in this particular case are exactly equivalent.

Similarly, in this particular report there was a note that hardly anyone [women] was hired at the upper ranks. It turned out that 14 percent were females; 14 percent of those hired as professors were females. If one tried to put together what roughly should be considered the unit from which they could be hired, it would be the associate professors or the full professors, presumably in other institutions. These constitute only 7 percent. Women constitute 7 percent of those cases. It is possible that more women are doing other things. But it turns out, using a little bit more control in terms of recruitment source, that women are not being penalized when 14 percent are being appointed in a given year as full professors.

We have the same type of problem in terms of the report at the City University on the status of women. If one looks at the report, and I believe there are eight departments which are looked at in considerable detail, women appear to be in smaller proportions than men in terms of the departments that are looked at. If one treats, in terms of the recruitment potential—either the local or the regional area, I am not going to the national, but what they point to themselves—women were apparently at parity in the two worst departments, which were psychology and English, and were way above parity in some of the other departments.

So, what I am pointing to is that there are certain controls that should be introduced. And if they are introduced correctly, then possibly no "problems" would result from such an analysis of what one

could expect. But intrinsically I think the constitutional mandate is that people should be treated by equal standards, not that people should be looking at goals or quotas.

COMMISSIONER SALTZMAN. Are you implying that goals inherently do not accord with equal standards required?

DR. BORGATTA. Not if they are interpreted the way they appear to be on the campus by professors and administrators and by HEW and other persons who are going onto the campus. We have had the statement that the law has not been properly enforced and that in many, many circumstances we have had illegal response and given preferential treatment. The question is: Can you educate people to operate by that system, or is it possible to go to an alternate procedure that does not involve that problem?

COMMISSIONER SALTZMAN. If, as you pointed out, the seat of forward-looking movements in this nation has been the university; isn't it surprising then that the greater depth of misunderstanding and illegal use of affirmative action has occurred in the university? Perhaps the university is not quite that great seat.

DR. BORGATTA. I never said that academics don't have bleeding hearts.

CHAIRMAN FLEMMING. I think at this point I am going to recess for about 15 minutes. I know Dr. Sowell has arrived, and I don't know whether Dr. Roche has or not. All I am asking the staff to do is take 15 minutes to rearrange things up here so that people can participate more comfortably.

[Recess.]

CHAIRMAN FLEMMING. It is 2:00. I would like to ask the members of the panel if they will reassemble. I am going to resume the hearing at this particular point.

I want to introduce Dr. Thomas Sowell, who is professor of economics at the University of California at Los Angeles. We are delighted to have him with us, and we look forward to any presentation he desires to make based upon his paper. Dr. Sowell?

PRESENTATION OF THOMAS SOWELL

[Dr. Sowell's presentation at the consultation was based on an earlier and shorter version of the following paper.]

Affirmative Action Reconsidered: Was It Necessary in Academia?

By Thomas Sowell*

Introduction

Labels and images have become central in the controversies surrounding affirmative action. To some people, affirmative action means making equal opportunity concrete, while to others it means reverse discrimination. To some people affirmative action is only a partial compensation for monumental wrongs, while to others it just means replacing competent whites with incompetent blacks. The reality of affirmative action is much more complex than the labels and images, both in concept and in practice.

To make these intricate and emotionally charged issues manageable, it is necessary (1) to distinguish the basic concepts and legal rationale of affirmative action from the many specific laws, regulations, and practices that have developed under the affirmative action label; (2) to measure in some general terms the magnitude of the problem that affirmative action programs were intended to solve or ameliorate; (3) to consider the actual results achieved and the general trends set in motion by these programs; and, finally, (4) to weigh the implications of affirmative action policies for those directly affected and for society in general.

This study draws upon the large general literature on race and sex differentials in employment, pay, and promotion prospects. In addition, it presents some original data specifically focused on *academic* employment, pay, and promotion. For many occupations, the fact that some of the factors determining individual qualifications for jobs are intangible makes it difficult to determine how much of the observed difference in end results is due to discriminatory treatment and how much to differences in the relevant capabilities. For the academic profession, however, many of the job qualifications that are either conceptually or statistically elusive in other occupations are spelled out—most bluntly in the "publish or perish" rule. For example, the possession or nonpossession of a Ph.D. is crucial to an academic career, and the quality of the department at which the Ph.D. was earned is of major importance at the outset of a career and exerts a continuing influence for years thereafter.[1] Comprehensive data available from the American Council on Education cover both the degree level of

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[1] Theodore Caplow and Reece J. McGee, *The Academic Marketplace* (New York: Basic Books, Inc., 1961), p. 225; David G. Brown, *The Mobile Professors* (Washington, D.C.: American Council on Education, 1967), p. 97.

academic individuals and the respective disciplines' own rankings of the various university departments which issue those degrees, as well as the publication records and academic salaries of individuals by race and sex. In addition, the National Academy of Sciences has made available data collected by the National Science Foundation on holders of doctoral degrees (Ph.D.s, M.D.s, and other doctorates) in various fields by race and sex. In short, the academic profession offers a unique combination of known job requirements and salary data with which to determine to what extent group differences in pay represent group differences in job requirements rather than employer discrimination.

I. The Concept

Among the many distinctions that need to be made is the crucial distinction between the *general principle* of affirmative action and the specific actions taken by the courts and administrative agencies. The general principle behind affirmative action is that a court order to "cease and desist" from some harmful activity may not be sufficient to undo the harm already done or even to prevent additional harm as the result of a pattern of events set in motion by the previous illegal activity. This general principle of affirmative action goes back much further than the civil rights legislation of the 1960s and extends well beyond questions involving ethnic minorities or women. In 1935, the Wagner Act prescribed "affirmative action" as well as "cease-and-desist" remedies against employers whose anti-union activities had violated the law.[2] Thus, in the landmark *Jones & Laughlin Steel* case which established the constitutionality of the act, the National Labor Relations Board ordered the company not only to stop discriminating against employees who were union members, but also to post notices to that effect in conspicuous places and to reinstate unlawfully discharged workers with back pay.[3] Had the company merely been ordered to cease and desist from economic (and physical) retaliation against union members, the *future* effect of its *past* intimidation would have continued to inhibit the free-choice elections guaranteed by the National Labor Relations Act.

Racial discrimination is another obvious area where merely to "cease and desist" is not enough. If a firm has engaged in racial discrimination for years and has an all-white work force as a result, then simply to stop explicit discrimination will mean little as long as the firm continues to hire its current employees' friends and relatives through word-of-mouth referral. (Many firms hire in just this way, regardless of their racial policies.) Clearly the area of racial discrimination is one in which positive or affirmative steps of some kind seem reasonable—which is not to say that the particular policies actually followed make sense.

[2] Section 10(c) of the National Labor Relations Act of 1935, 49 Stat. 449, 454 (1935).
[3] Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley* (Chicago: University of Chicago Press, 1950), p. 97.

Many different policies have gone under the general label of affirmative action, and many different institutions—courts, executive agencies, and even private organizations—have been involved in formulating or interpreting the meaning of the label. The conflicting tendencies and pressures of these various institutions have shifted the meaning of affirmative action and produced inconsistent concepts as well. There is no way to determine the meaning of "affirmative action." All that can be done is to examine the particulars—the concepts, the intentions, and the actual effects.

In a society where people come from a wide variety of backgrounds and where some backgrounds have been severely limited by past discrimination, the very definition of equality of opportunity is elusive. For example, a seniority system in a company which previously refused to hire minority individuals means that present and future discrimination occur because of past discrimination. In 1969, the court of appeals struck down such a system on grounds of its current discriminatory effect.[4] In another 1969 case, the Supreme Court struck down a mental test for voters in a community with a long history of providing segregated and inferior education for Negroes.[5] Again, the rationale was that the test represented present discrimination, considering the community's past behavior. This case touches the crucial question of what to do when the effects of past discrimination are reflected in current individual capabilities. Is equal opportunity itself discriminatory under such circumstances? If so, is anything more than equality of treatment justifiable under the 14th amendment and corollary statutes and court rulings? As important as the question of whether a legal basis exists for any compensatory or preferential treatment is the question of who should bear the inevitable costs of giving some citizens more than equal treatment. A question may also be raised as to whether compensatory or preferential treatment really serves the long-run interests of the supposed beneficiaries.

The legislative history of the Civil Rights Act of 1964 shows that many of these concerns and dilemmas were present from the outset. Senator Hubert Humphrey (Democrat, Minnesota), in helping to steer this legislation through Congress, attempted to meet criticism by pointing out that the act "does not require an employer to achieve any kind of racial balance in his work force by giving any kind of preferential treatment to any individual or group."[6] He said that there must be "an intention to discriminate" before an employer can be considered in violation of the law and that the "express requirement of

[4] Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States, 416 F 2d 980 (5th Cir., 1969).

[5] Gaston County v. United States, 395 U.S. 285 (1969).

[6] U.S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* (Washington, D.C. U.S. Government Printing Office, n.d.), p. 3005. Hereafter referred to as *Legislative History.*

intent" was meant to prevent "inadvertent or accidental" conditions from leading to "court orders."[7] Senator Joseph Clark (Democrat, Pennsylvania), another supporter, made it clear that the burden of proof was to be on the Equal Employment Opportunity Commission (EEOC) to "prove by a preponderance" that a "discharge or other personnel action was because of race"; Senator Clark added categorically: "Quotas are themselves discriminatory."[8]

Congress also faced the question of what to do about groups whose historic disadvantages left them in a difficult position when competing on tests with members of the general population. Senator John Towers (Republican, Texas) cited, as an example of what he was opposed to, a case in Illinois where a State agency had forced a company to abandon an ability test which was considered "unfair to 'culturally deprived and disadvantaged groups.'"[9] Senator Clifford Case (Republican, New Jersey) replied that "no member of the Senate disagrees" with Tower on this point, and Senator Humphrey affirmed that ability tests "are legal unless used for the purpose of discrimination."[10] Humphrey rejected Tower's proposed explicit amendment on this point because he considered it "redundant": "These tests are legal. They do not need to be legalized a second time."[11] Senator Case characterized the Illinois State agency's actions as an "abuse"[12] and insisted that the Civil Rights Act did not embody "anything like" the principle of the Illinois case.[13] Humphrey brushed aside the Illinois case as "the tentative action of one man," which he was sure the Illinois commission as a whole would "never" accept.[14]

Despite the clear intent of both the supporters and opponents of the 1964 Civil Rights Act, the actual administration of the law has led precisely in the direction which its sponsors considered impossible. The burden of proof has been put on the employer whose work force does not reflect the racial or sex proportions deemed appropriate by the Federal agencies administering the law. The chairman of the Equal Employment Opportunity Commission has demanded of employer witnesses at public hearings what has been "the action taken to hire more minority people."[15] The Commission's position is that "any discussion of equal employment opportunity programs is meaningful only when it includes consideration of their results—or lack of

[7] Ibid., p. 3006.
[8] Ibid., p. 3015.
[9] Ibid., p. 3134.
[10] Ibid., p. 3160.
[11] Ibid.
[12] Ibid., p. 3131.
[13] Ibid., p. 3161.
[14] Ibid., p. 3131.
[15] *Hearings before the United States Equal Employment Opportunity Commission on Discrimination in White Collar Employment.* Hearings held in New York, New York, January 15–18, 1968 (Washington, D.C.: U.S. Government Printing Office, n.d.), p. 110. Hereinafter cited as *EEOC Hearings, New York, 1969.*

results—in terms of actual numbers of jobs for minorities and women. . . ."[16] Numbers and percentages are repeatedly invoked to show "discrimination"[17]—without any reference to individual cases or individual qualifications and with percentages below EEOC's expectations being characterized as "exclusions" or "underutilization." The notion of qualified applicants has been expanded to mean "qualified people to train"[18]—that is, people lacking the requirements of the job whom the employer would have to train at his own expense. Contrary to the congressional debates, the burden of proof has been put on the employer to show the validity of the tests used,[19] and the notion of "tests" has been expanded to include job criteria in general, whether embodied in a test or not.[20] As for employer intentions, a poster prepared by the EEOC itself includes among 10 true-false questions the statement, "An employer only disobeys the Equal Employment Opportunity laws when it is acting intentionally or with ill motive"[21]—and the answer to that question is *false*. Despite Senator Humphrey's assurances about "express requirement of intent," legal action can be taken on the basis of "inadvertent or accidental" conditions.

The EEOC is only one of many Federal agencies administering the Civil Rights Act in general or the affirmative action programs in particular. There are overlapping jurisdictions of the Department of Labor; the Department of Health, Education, and Welfare; the Department of Justice; the EEOC; and the Federal courts.[22] There are also regional offices of all these agencies which vary significantly in their respective practices.[23] Moreover, when one Federal agency approves—or requires—a given course of action, following such an approved course of action in no way protects the employer from being sued by another Federal agency or by private individuals because of those very actions.[24] Indeed, Federal agencies have sued one another under this act.[25] In short, the meaning of the act is not clear even to those intimately involved in its administration.

The courts have not gone as far as the administrative agencies in forcing numerical "goals and timetables" on employers. Numerical specifications have typically been invoked by courts only where there has been demonstrable discrimination by the particular employer in

[16] *Hearings before the Equal Employment Opportunity Commission on Utilization of Minority and Women Workers in Certain Major Industries.* Hearings held in Los Angeles, California, March 12–14, 1969. Hereinafter cited as *EEOC Hearings, Los Angeles, 1969.*

[17] EEOC Hearings, New York, 1969, pp. 1, 4–13, 161, 169, 444.

[18] Ibid., p. 303.

[19] "Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964," *Harvard Law Review*, March 1971, pp. 1132–39.

[20] Richard A. Lester, *Antibias Regulation of Universities* (New York: McGraw-Hill Company, 1974), p. 126n.

[21] G.P.O. 870-933.

[22] Lester, *Antibias Regulation*, pp. 3–4.

[23] Ibid., pp. 89–91.

[24] Ibid., pp. 90, 117.

[25] Francis Ward, "U.S. Agencies Clash in Rights Lawsuit," *Los Angeles Times*, April 27, 1975, Part IV, p. 1 ff.

question—not simply where there are "wrong" racial proportions. In this specific context, numerical goals are "a starting point in the process of shaping a remedy" for "past discriminatory hiring practices" by the employer to whom the court order applies.[26] In the landmark case of *Griggs v. Duke Power Company,* the Supreme Court included the company's past record of racial discrimination as a reason why the company could not use tests which (1) eliminated more black job applicants than white job applicants and (2) had no demonstrated relationship to actual job performance.[27] In general, the courts have rejected the notion that "any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . ."[28]

Legal remedies under the Civil Rights Act and related Executive orders of the President range from cease-and-desist orders through individual reinstatement and group preferential hiring to the cutting off of all Federal contracts to the offending employer. The latter is a virtual sentence of death to any leading research university, whether public or "private," for they are all dependent upon Federal money to maintain their competitive standing and will sustain a massive loss of top faculty without it.

II. The Problem

There is little real question that if one goes back a number of years one finds a pervasive pattern of discrimination against minorities in academic employment. This applies not only to blacks and other minorities regarded as "disadvantaged," but also to Jews, who were effectively excluded from many leading university faculties before World War II.[29] The situation of women is somewhat more complicated and so will be deferred for the moment. However, the question that is relevant to affirmative action programs for both minorities and women is, what was the situation at the onset of such programs and how has the situation changed since?

While colleges and universities were subject to the general provisions of the Civil Rights Act of 1964 and to subsequent Executive orders authorizing cancellation of Federal contracts for noncompliance,[30] the *numerical proportions* approach dates from the Labor Department's 1968 regulations as applied to academic institutions by the Department of Health, Education, and Welfare.[31] More detailed requirements—including the requirement of a written affirmative

[26] 026Carter v. Gallagher, 452 F.2d 315, 331 (1971).
[27] 401 U.S. 424 (1971).
[28] Ibid., pp. 430–31.
[29] Michael R. Winston, "Through the Back Door: Academic Racism and the Negro Scholar in Historical Perspective," *Daedalus,* vol. 100, no. 3 (Summer 1971), p. 695.
[30] Lester, *Antibias Regulation,* pp. 3–4.
[31] Ibid., pp. 62–63.

action program by each institution—were added in Revised Order No. 4 of 1971,[33] which contains the crucial requirement that to be "acceptable" an institution's "affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women" and must establish "goals and timetables" for increasing such "utilization" so as to remedy these "deficiencies."[33]

For purposes of establishing a chronology, 1971 may be taken as the beginning of the application of numerical goals and timetables to the academic world. The question thus becomes, what were the conditions in academic employment, pay, and promotions as of that date? For minorities in general, and blacks in particular as the largest minority, *virtually nothing* was known about academic employment conditions at that point. Assumptions and impressions abounded, but the first national statistical study of the salaries of black academics is that published in 1974 by Professor Kent G. Mommsen of the University of Utah.[34] In short, affirmative action programs had been going full blast for years before anyone knew the dimensions of the problem to be solved. Professor Mommsen's data for the academic year 1968–70 show a grand total of *$62 per year* salary difference between black Ph.D.s and white Ph.D.s.[35] An earlier study by Professor David Rafky found that only *8 percent* of black academics in white institutions regarded themselves as having personally experienced discrimination in their careers.[36]

These data may seem to be sharply at variance with data showing numerical "underutilization" of minorities in the white academic world, and it is these latter data which HEW and other supporters of affirmative action rely upon. There are some rather simple and straightforward reasons why the percentage of blacks (or minorities in general) in the academic world (or at white institutions) is smaller than their percentage in the general population:

(1) Only a *very* small proportion of blacks meet the standard requirements of a Ph.D. for an academic career. Less than 1 percent of the doctorates earned in the United States are received by blacks

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[33] Ibid., p. 76

[33] Ibid.

[34] Kent G. Mommsen, "Black Doctorates in American Higher Education: A Cohort Analysis," *Journal of Social and Behavioral Science*, Spring 1974.

[35] Ibid., pp. 104, 107.

[36] David Rafky, "The Black Academic in the Marketplace," *Change*, vol. 3, no. 6 (October 1971), p. 65. A sharp distinction must be made between personal experience of discrimination and general opinions that discrimination exists. Both minorities and women report very little personal experience of discrimination and at the same time a widespread impression that discrimination is pervasive. See "Discrimination: A Cautionary Note," *Law and Liberty*, vol. 1, no. 3, p. 11. Similar inconsistencies are found in opinion surveys of the general population. See Ben J. Wattenberg, *The Real America* (Garden City: Doubleday v Co., Inc., 1974), pp. 196, 198.

and, despite many special minority programs and much publicity, less than 2 percent of graduate students are black.[37] Various surveys and estimates show less than 4,000 black Ph.D.s in the United States.[38] This is less than two black Ph.D.s for every American college or university—regardless of what goals and timetables may be set.

(2) Most black academics teach at black colleges and black universities,[39] and so do not show up in the predominantly white institutions where affirmative action data are collected. Nor are these black academics eager to leave and join white faculties elsewhere: the average salary increase required to induce black academics to move was over $6,000 a year in 1970.[40] The crucial element of individual *choice* is left out of the affirmative action syllogism that goes from numerical "underrepresentation" to "exclusion." One study (by strong supporters of affirmative action) showed that some black academics refuse even to go for an interview at institutions that do not have a black community nearby.[41]

(3) The career characteristics of most black academics do not match the career characteristics of white (or black) faculty at the leading research universities that are the focus of affirmative action pressures. This is particularly true of the two key requirements at research universities—the Ph.D. and research publications. A survey of the faculty at black private colleges and universities found that only 25 percent had a doctorate and only 4 percent had ever published in a scholarly journal.[42] None of this is surprising, given the history of blacks in the United States. Nor should it be surprising that academics with those characteristics prefer to remain at teaching institutions rather than move to research universities.

None of this disproves the existence of discrimination in the academic world. It merely indicates that numerical underrepresentation is not automatically equivalent to discrimination. More fundamentally, it makes discrimination an empirical question—not something to be established intellectually by sheer force of preconception or to be established administratively by simply putting a never-ending burden of proof (or disproof) on institutions. For both minorities and women, a distinction must be made between saying that there is discrimination in general and establishing the particular *locus* of that discrimination. Even the most casual acquaintance with American history is sufficient to establish the existence of discrimination against blacks. The question

[37] Kent G. Mommsen, "Black Ph.D.s in the Academic Marketplace," *Journal of Higher Education*, vol. 45, no. 4 (April 1974), p. 253.
[38] Ibid., p. 256.
[39] Ibid., p. 258.
[40] Ibid., p. 262.
[41] William Moore, Jr., and Lonnie H. Wagstaff, *Black Educators in White Colleges* (San Francisco: Jossey-Bass Publishers, 1970), pp. 64–65.
[42] Daniel C. Thompson, *Private Colleges at the Crossroads* (Westport, Conn.: Greenwood Press, Inc., 1973), p. 155. See also Moore and Wagstaff, *Black Educators in White Colleges*, pp. 142–43.

is whether the statistical end results so emphasized by HEW are *caused* by the institutions at which the statistics were gathered.

The extent to which the patterns of minorities can be generalized to women is also ultimately an empirical question. In some specific and important respects, academic women are quite different from minority academics:

(1) Women have *not* risen to their present proportions among college and university faculty from lower proportions in earlier eras, despite a tendency towards such fictitious parallelism in the literature.[43] Women constituted more than 30 percent of all faculty members in 1930, and the proportion declined over the next 30 years to about 20 percent in 1960. Women reached a peak of nearly 40 percent of all academic personnel (faculty and administrators) in 1879, with fluctuations, generally downward, since then.[44] Similar declines have occurred in the representation of women in other high-level professions over a similar span, both in the United States and in Europe.[45] It is not merely that much of the assumed history of women is wrong but, more important, that the *reason* for current female disadvantages in employment, pay, and promotion are misunderstood as a result. The declining proportions of female academics occurred over a period of rising rates of marriage among academic women,[46] and a period of rising birthrates among white women in general.[47] In short, there is at least *prima facie* evidence that domestic responsibilities have had a major impact on the academic careers of women over time—which raises the question whether domestic responsibilities should not be investigated further as a factor in current female career differences from males, rather than going directly from numerical "underrepresentation" to "exclusion" and "discrimination."

(2) Women have administered and staffed academically top-rated colleges for more than a century,[48] in contrast to the black colleges which have never had top-rated students or faculty.[49] Although women's colleges such as Bryn Mawr, Smith, and Vassar have been teaching institutions rather than research universities, their students have been quite similar academically to those in the research universities and their faculty typically has had training similar to that of the faculties of research institutions. In fact, in some instances,

[43] For example, the "remarkable record of women's progress through the professional ranks of a hitherto rigid academic system." *Change*, vol. 7, no. 4 (May 1975), back cover.

[44] Jessie Bernard, *Academic Women* (University Park: Pennsylvania State University Press, 1964), p. 39.

[45] John B. Parrish, "Professional Womanpower as a National Resource," *Quarterly Review of Economics and Business*, Spring 1961, pp. 58–59.

[46] Bernard, *Academic Women*, p. 206.

[47] Ibid., p. 74.

[48] Ibid., pp. 2–3, 31–32, 38n–39n.

[49] Christopher Jencks and David Riesman, "The American Negro College," *Harvard Educational Review*, vol. 37, no. 1 (Winter 1967), pp. 3–60; Thomas Sowell, *Black Education: Myths and Tragedies* (New York: David McKay Co., 1972), pp. 255–59.

these women's colleges have been part of research universities (Radcliffe, Barnard, Pembroke, and so on). In short, academic women have had both higher academic standing than minorities and readier access to faculty positions at research universities. Information barriers in particular have been far less important in the case of women than in the minority case, and word-of-mouth methods of communication among prestige institutions have included women for a longer time.

The point here is not to minimize women's problems but to point out that they are in some ways distinct from the problems of minorities. In other ways, of course, they are similar. For example, women academics also do not publish as much as academics in general,[50] and women academics do not have a Ph.D. as often as other academics.[51] But in the crucial area of salary, not only do women academics average less than men,[52] but also female Ph.D.s average significantly less than male Ph.D.s.[53] In short, women in academia face a different, though overlapping, set of problems from those faced by minorities in academia.

In addition to questions about the HEW "solution" for minorities, there may be additional questions about the simple extension of the minority solution to women by Executive Order No. 11375.

It must be emphasized that all the statistics cited thus far are for the academic world prior to affirmative action. They are intended to give a picture of the dimensions and nature of the problem that existed so as to provide a basis for judging the necessity of what was done under affirmative action programs. Now the results of those programs can also be considered.

III. The Results

The academic employment situation has been described in terms of rough global comparisons—black-white or male-female. Finer breakdowns are necessary in order for us to determine the effects of many variables which differ between the groups whose economic conditions are being compared. Some of these intergroup differences have already been mentioned—educational differences and differences in publications, for example—but there are others as well. If discrimination is to mean unequal treatment of equal individuals, then comparisons must be made between individuals who are similar with respect to the variables which generally determine employment, pay, and promotion. Only insofar as we succeed in specifying all these variables can we confidently refer to the remaining economic differences as "discrimination." One of the perverse aspects of this residual method of measuring

[50] Lester, *Antibias Regulation*, p. 47.
[51] Ibid., p. 42.
[52] Juanita Kreps, *Sex in the Marketplace* (Baltimore: Johns Hopkins Press, 1971), p. 52.
[53] Rita James et al., "The Woman Ph.D., A Recent Profile," *Social Problems*, vol.15, no. 2 (Fall 1967), pp. 227–28.

discrimination is that the more determining variables that are overlooked or ignored, the more discrimination there seems to be. Since no study can specify all relevant variables, the residual pay differences between minority and female academics, on the one hand, and white males, on the other, must be understood as the upper limit of an estimate of discriminatory differences.

For both sets of comparisons, the data sources are the American Council on Education (ACE) and the National Academy of Sciences (NAS). The ACE data are based on a sample of 60,028 academicians surveyed in 1969 and a sample of 50,034 academicians surveyed in 1972. The NAS data are from (1) a National Science Foundation survey conducted in 1973, based on a stratified sample of 59,086 doctorates in the social and natural sciences and engineering[54] and (2) a longitudinal compilation by NAS of biennial surveys of the same target population by the National Science Foundation during 1960–70.

Minorities. Existing studies of black faculty members show many ways in which their job-related characteristics differ from those of faculty members in general. All these differences tend to have a negative impact on employment, pay, and promotion for academics in general:

(1) A smaller proportion of black faculty than of white faculty holds a doctoral degree.[55]

(2) The *distribution* of black doctoral fields of specialization is biased towards the lower-paying fields—particularly education (roughly one-third of all black doctorates) and the social sciences (one-fourth)—with very few (about 10 percent) of the doctorates in the natural sciences.[56]

(3) The bulk of black faculty is located in the South[57]—a lower-paying region for academics in general,[58] as well as for others.

(4) Blacks complete their Ph.D.s at a later age than whites[59]—a reflection of both financial and educational disadvantages—and academics in general who complete their Ph.D.s at a later age tend to be less "productive" in research publications.

(5) Black academics, both at black colleges and at white institutions publish much less than white academics.[60] Among the factors associated with this are much higher teaching loads and late completion of the Ph.D.

(6) Black academics are less mobile than white academics—and less mobile academics tend to earn lower salaries. Forty percent of the

[54] National Academy of Sciences, *Doctoral Scientists and Engineers in the United States: 1973 Profile* (Washington, D.C.: National Academy of Sciences, 1974), p. 30.
[55] Lester, *Antibias Regulation*, p. 50.
[56] Mommsen, "Black Doctorates," pp. 103–04.
[57] Mommsen, "Black Ph.D.s," p. 258.
[58] David G. Brown, *The Market for College Teachers* (Chapel Hill: University of North Carolina Press, 1965), p. 83.
[59] Lester, *Antibias Regulation*, p. 49.
[60] Thompson, *Private Black Colleges at the Crossroads*, p. 155.

black professors in the Mommsen study had not moved at all, despite an average of three or four job offers per year,[61] and the median pay increase which they considered necessary to make them move was a $6,134 per year raise.[62] By contrast, among faculty in general, "the academic career is marked by high mobility"[63] and "professors expect to switch schools several times, at least, during their careers."[64]

(7) Women constitute a higher proportion (20 percent) of black doctorates than of doctorates in general (13 percent)[65] — and women earn less than men among both blacks and whites.

With all these downward biases, it is worth noting once again that the academic salaries of white doctorates averaged only $62 per year more than those of black doctorates in 1970. On a field-by-field basis, black doctorates were generally earning more than white doctorates in the same area of specialization and receiving more job offers per year,[66]— all this before the affirmative action program under Revised Order No. 4 in 1971. In other words, the effect of the straightforward antidiscrimination laws of the 1960s and of the general drive toward racial integration had created a premium for qualified black academics, even before HEW's goals and timetables. Moreover, the improvements that have occurred since then need not be due to HEW pressures but may be thought of as a continuation of trends already evident before affirmation action programs began.

The data from the American Council on Education permit a standardization for degree level, degree quality, field of specialization, and number of articles published, so that the salaries of blacks, whites, and Orientals who are comparable in these respects may be compared. Table 1 omits field of specialization to give a general view of race and salary in the academic world as a whole. Degree rankings in the table are based on surveys conducted by the ACE to determine the relative rankings of Ph.D.-granting departments in 29 disciplines, as ranked by members of those respective disciplines. (I have collapsed the two departmental rankings, "distinguished" and "strong," into one category in order to maintain a large sample size.) Articles published were selected as a proxy for publication in general, avoiding the problem of trying to convert books, monographs, conference papers, and articles into some equivalent.

My results for 1973 (table 1) are generally not very different from those of Professor Mommsen for 1970: White faculty earned slightly more than black faculty in general ($16,677 versus $16,037). But when degree level and degree quality are held constant, blacks earned more

[61] Mommsen, "Black Ph.D.s," pp. 258–59.
[62] Ibid., p. 262.
[63] Caplow and McGee, *Academic Marketplace*, p. 41.
[64] Brown, *The Mobile Professors*, p. 26.
[65] Lester, *Antibias Regulation*, p. 48.
[66] Mommsen, "Black Ph.D.s," pp. 262, 259.

Table 1

MEAN ANNUAL SALARIES OF FULL-TIME FACULTY, 1972–73

Race and Articles Published	Degree Quality									
	Total		"Distinguished" and "strong" Ph.D.s		Lower-ranked Ph.D.s		Unranked Doctorates		Less than Ph.D.	
	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size
WHITES	$16,677	359,828	$17,991	39,603	$17,414	51,490	$18,179	44,224	$15,981	224,510
5 or more	19,969	111,160	20,073	22,741	19,334	28,014	20,008	24,886	20,376	35,519
1-4 articles	15,702	101,132	15,486	11,700	15,252	15,820	16,153	12,457	15,767	61,156
No articles	14,780	142,869	14,013	4,653	14,507	6,948	14,977	6,348	14,814	124,920
No response	17,488	4,667	18,918	509	18,323	709	18,285	534	16,889	2,915
BLACKS	16,037	9,273	20,399	352	19,014	550	20,499	730	15,195	7,640
5 or more	22,583	1,115	21,211	181	21,877	293	28,783	249	19,797	391
1-4 articles	16,430	2,348	19,124	100	16,139	158	17,165	279	16,194	1,812
No articles	14,586	5,559	16,557	54	15,188	93	13,853	173	14,580	5,240
No response	15,403	251	31,000	18	14,000	6	20,896	29	13,244	197
ORIENTALS	15,419	4,678	18,235	740	17,035	1,248	16,724	785	12,727	1,905
5 or more	17,190	2,029	17,485	467	18,158	740	18,035	503	13,182	319
1-4 articles	15,082	948	21,084	220	14,869	224	14,539	155	11,674	348
No articles	13,200	1,651	13,091	46	15,813	276	13,899	120	12,538	1,209
No response	23,176	50	13,000	7	15,[illegible]09	7	19,131	7	28,679	28

Source: American Council on Education.

than whites with doctorates of whatever ranking, while whites had an edge of less than $100 per year among academics without a doctorate. The overall salary advantage of whites over blacks—$640 per year—is a result of a different *distribution* of the races among degree levels and degree qualities as well as a different distribution among publication categories. For example, 11 percent of the white faculty members in the ACE samples had Ph.D.s from departments ranked either "distinguished" or "strong" by their respective professions, while only 4 percent of the black faculty came from such departments. Only 18 percent of the black academics in this sample had a doctorate at all, compared to 38 percent of the white academics. Thirty-one percent of the white faculty had published five or more articles while only 12 percent of the black faculty had done so. Blacks who had published at all had higher salaries than whites with the same number of publications.

Orientals present a somewhat different picture. Only those Orientals with "distinguished" and "strong" Ph.D.s received slightly higher salaries than their white counterparts ($18,235 versus $17,991), and even this difference was not uniform across publications categories. Among the lower-ranked doctorates, both whites and blacks earned more than Orientals, and among those with less than a doctorate, considerably more. The overall salary average of Orientals was only slightly below that of blacks, but solely because Orientals were far more concentrated in the higher degree levels and higher degree qualities. Less than half of the Oriental faculty members lacked the Ph.D. and more than 40 percent of all Oriental faculty had published five or more articles. In short, just as group differentials do not imply discrimination, so an absence of such differentials does not imply an absence of discrimination. Orientals receive less than either blacks or whites with the same qualifications, and only the fact that the Orientals have generally better qualifications than either of the other two groups conceals this.

When field-by-field comparisons are made, very similar patterns emerge. In the social sciences, blacks have higher salaries than whites or Orientals, and especially so among holders of Ph.D.s from "distinguished" and "strong" departments (table 2). In the natural sciences (table 3) and the humanities (table 4), whites lead, with blacks second in the humanities and Orientals second in the natural sciences. A comparison of overall sample size from one table to another reveals very different distributions of these racial groups among academic fields: 37 percent of all black faculty members were in the social sciences, 23 percent were in the humanities, and only 16 percent were in the natural sciences. By contrast, 44 percent of the Orientals were in the natural sciences, 28 percent in the social sciences, and only 16 percent in the humanities. Whites were distributed more or less midway between blacks and Orientals: 30 percent in the social sciences,

24 percent in the humanities, and 25 percent in the natural sciences. Again, the net effect of these distributions is to exaggerate the overall salary differences between blacks and whites and to understate salary differences between Orientals and whites.

The National Academy of Sciences data confirm some of these patterns and reveal some new ones. NAS data for full-time doctoral scientists and engineers (academic and nonacademic) show blacks earning slightly more than whites, with Orientals last—and a spread of only $1,500 per year over all three groups (table 5). Publications data are not available for this survey but age was tabulated as a proxy for experience. Degree quality was again available, and again Orientals with given credentials quality had lower salaries than either blacks or whites in the same categories. In all three groups, salary rises with age, but the *relative* positions of blacks and whites are reversed in the oldest and youngest age brackets. Young black doctorates—under 35—earn more than their white counterparts in either degree quality category, but older blacks—over 50—earn less than their white counterparts in either degree quality category. These results hold up when the sample is broken down into natural sciences and social sciences. It is also consistent with a larger study by Professor Finis Welch of UCLA which showed a much higher rate of return to education for younger blacks than for older blacks—both absolutely and relative to their white counterparts.[67] Two important factors are involved here: (1) the older blacks were educated in an era when their public school education was inferior not only by various quality measures but also in sheer quantity (black schools had fewer days than white schools in their respective school years),[68] and this poorer preparation could not help affecting later capability; and (2) the level of job discrimination was also greater when the older blacks began their careers, and this too could not help affecting the later course of those careers, making it difficult for these blacks to exploit new opportunities as readily as the younger blacks just beginning their careers. A further implication of all this is that global comparisons of blacks and whites capture many existing effects of past discrimination, while an age-cohort breakdown of the same data permits a better look at the current results of current policies and the trends to expect in the future.

In summary, the salary differentials among these three racial or ethnic groups are small, both in the academic world and among holders of the doctorate in the social or natural sciences (academic and nonacademic). With such variables as credentials, publications, and experience held constant, blacks equalled or surpassed whites in 1973—but they also equalled or surpassed whites with fields held constant in

[67] Finis Welch, "Black-White Differences in Returns to Schooling," *American Economic Review*, vol. 63, no. 5 (December 1973), pp. 893–907.
[68] Ibid., p. 894.

Table 2

MEAN ANNUAL SALARIES OF FULL-TIME FACULTY IN THE SOCIAL SCIENCES, 1972–73

Race and Articles Published	Degree Quality									
	Total		"Distinguished" and "strong" Ph.D.s		Lower-ranked Ph.D.s		Unranked Doctorates		Less than Ph.D.	
	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size
WHITES	$16,872	108,733	$18,369	17,307	$17,192	16,680	$18,132	10,417	$16,182	64,329
5 or more	19,924	30,623	20,753	9,563	19,161	7,939	20,105	4,295	19,623	8,827
1-4 articles	16,117	34,213	15,618	5,339	15,620	5,930	17,508	3,362	16,165	19,582
No articles	15,263	42,216	14,413	2,141	14,618	2,579	15,770	2,626	15,325	34,870
No response	17,040	1,681	19,728	264	18,583	232	16,832	135	16,050	1,050
BLACKS	17,527	3,373	20,451	186	20,344	222	20,487	326	16,718	2,639
5 or more	24,088	381	21,370	109	22,676	128	31,434	97	19,240	48
1-4 articles	15,162	977	19,688	66	17,919	54	18,176	103	14,154	754
No articles	17,793	1,914	15,813	11	16,232	40	13,324	121	18,152	1,742
No response	10,540	100	—	—	—	—	30,000	5	9,509	95
ORIENTALS	15,089	1,313	18,844	203	16,449	324	13,338	70	13,581	717
5 or more	15,653	350	18,204	101	18,700	95	16,216	7	11,931	148
1-4 articles	17,042	253	22,897	69	14,836	96	12,445	22	15,649	67
No articles	14,115	710	12,317	33	16,004	134	13,351	41	13,793	502
No response	—	—	—	—	—	—	—	—	—	—

Source: American Council on Education.

Table 3

MEAN ANNUAL SALARIES OF FULL-TIME FACULTY IN THE NATURAL SCIENCES, 1972–73

Race and Articles Published	Degree Quality									
	Total		"Distinguished" and "strong" Ph.D.s		Lower-ranked Ph.D.s		Unranked Doctorates		Less than Ph.D.	
	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size
WHITES	$17,225	91,411	$18,377	12,457	$18,130	25,282	$18,361	12,575	$15,972	41,098
5 or more	19,469	43,243	19,535	8,946	19,527	16,746	19,339	9,228	19,426	8,324
1-4 articles	15,735	22,667	15,442	2,863	15,259	6,446	15,342	2,739	16,203	10,619
No articles	14,618	24,571	14,268	487	15,206	1,774	16,030	427	14,551	21,882
No response	18,090	929	18,646	160	19,069	316	19,651	181	15,589	272
BLACKS	15,176	1,474	20,436	78	17,950	243	18,383	167	13,535	986
5 or more	20,640	366	20,837	51	20,445	136	24,069	57	19,180	122
1-4 articles	14,562	410	18,023	16	14,560	76	16,444	70	13,817	248
No articles	12,051	639	22,000	11	15,672	25	13,779	41	11,572	562
No response	19,365	60	—	—	14,000	6	—	—	20,000	53
ORIENTALS	16,797	2,035	18,145	490	17,709	754	17,132	441	12,520	349
5 or more	17,852	1,320	17,276	342	18,301	588	18,135	319	15,646	71
1-4 articles	16,417	415	20,672	137	15,793	101	14,568	84	12,498	93
No articles	12,466	281	15,000	4	15,344	61	13,311	31	11,333	186
No response	15,902	19	13,000	7	15,000	4	19,131	7	—	—

Source: American Council on Education.

Table 4

MEAN ANNUAL SALARIES OF FULL-TIME FACULTY IN THE HUMANITIES, 1972–73

Race and Articles Published	Degree Quality									
	Total		"Distinguished" and "strong" Ph.D.s		Lower-ranked Ph.D.s		Unranked Doctorates		Less than Ph.D.	
	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size	Salary	Population size
WHITES	$15,572	85,904	$16,832	9,765	$15,659	9,084	$15,225	8,810	$15,293	58,245
5 or more	18,425	17,001	19,707	4,165	18,399	2,954	18,414	3,681	17,584	6,202
1-4 articles	15,419	23,923	15,315	3,490	14,573	3,381	14,776	3,048	15,789	14,004
No articles	14,497	43,751	13,530	2,025	13,920	2,594	13,059	1,943	14,667	37,149
No response	17,313	1,228	16,911	85	16,227	154	16,173	99	17,666	890
BLACKS	15,034	2,177	20,259	89	16,743	74	17,650	99	14,590	1,915
5 or more	16,221	135	22,296	21	21,513	19	21,507	15	12,658	80
1-4 articles	21,354	604	18,000	18	16,972	28	16,172	61	22,348	498
No articles	11,869	1,347	14,955	32	13,201	27	—	—	11,764	1,288
No response	18,175	91	31,000	18	—	—	19,000	24	13,161	49
ORIENTALS	13,005	757	16,561	47	14,860	146	16,003	90	11,509	473
5 or more	14,629	199	17,443	24	14,922	33	17,544	63	11,294	79
1-4 articles	10,317	239	16,110	14	11,557	27	11,738	15	9,579	183
No articles	13,000	306	15,000	9	15,487	82	13,000	12	11,753	203
No response	39,032	12	—	—	17,000	3	—	—	47,393	9

Source: American Council on Education.

Table 5

MEDIAN ANNUAL SALARIES OF FULL-TIME SCIENTISTS AND ENGINEERS, BY RACIAL GROUP AND DEGREE QUALITY, 1973

Race and Age Group	Degree Quality					
	Total		"Distinguished" and "strong" Ph.D.s		Other	
	Salary	Sample size	Salary	Sample size	Salary	Sample size
WHITES	$20,988	28,048	$22,146	8,589	$20,275	19,459
Under 35 years	17,228	6,615	17,879	1,827	16,933	4,788
35–49	21,757	14,024	22,480	4,167	21,342	9,857
50+	25,357	7,409	26,333	2,595	24,704	4,814
BLACKS	21,445	261	23,268	54	20,597	207
Under 35 years	18,660	44	20,476	4	18,396	40
35–49	21,256	149	22,998	26	20,668	123
50+	23,460	68	24,307	24	22,770	44
ORIENTALS	20,005	1,087	20,222	330	19,862	757
Under 35 years	16,230	210	18,162	50	15,364	150
35–49	20,613	676	20,378	206	20,761	470
50+	23,261	201	22,429	64	23,660	137

Source: 1973 Survey of Doctoral Scientists and Engineers, National Research Council, National Academy of Sciences.

1970. Without these variables held constant, the overall black-white differential was $62 per year in 1970 and $640 in 1973. Given that these are different samples, it is perhaps best to say that there were negligible overall differences among black and white academics in both years—that affirmative action has achieved nothing discernible in this regard. But if an arithmetic conclusion is insisted upon, then it must be said that there has been a negative effect of affirmative action as far as black-white differences are concerned.

Women. The classic study *Academic Women* by Jessie Bernard described women as "overrepresented in college teaching." This was based on the fact that women were only 10 percent of the Ph.Ds but constituted more than 20 percent of college and university faculties.[69] This was written in 1964—before affirmative action. Unlike HEW's crude "underutilization" measures, this study (by an academic woman) considered not only the number of women with the usual degree requirements but also "the large number of educated women—30.6 percent of those with five years or more of college—who are not in the labor force."[70] Withdrawal from the labor force is only one of many career characteristics which have a negative effect on the employment, pay, and promotion of academic women. Some others are:

(1) Female academics hold a doctorate less frequently than male academics—20 percent as against 40 percent in 1972–73.[71]

(2) Female academics publish only about half as many articles and books per person as do male academics,[72] and females are especially underrepresented among frequent publishers.[73]

(3) Academic women are educated disproportionately in lower-paying fields of specialization, such as the humanities,[74] and they prefer teaching over research more so than academic men, not only in attitude surveys,[75] but also in their allocation of time[76] and in the kinds of institutions at which they work[77]—which are the low-paying teaching institutions more so than the top research universities with high salaries.

(4) Academic women more frequently subordinate their careers to their spouses' careers, or to the general well-being of their families,

[69] Bernard, *Academic Women*, p. 52.
[70] Lester, *Antibias Regulation*, p. 42.
[71] Alan E. Bayer, *Teaching Faculty in Academe: 1972-73* (Washington, D. C.: American Council on Education, 1973), p. 15.
[72] Frank Clemente, "Early Career Determinants of Research Productivity," *American Journal of Sociology*, vol. 79, no. 2 (September 1973), p. 414; Lester, *Antibias Regulation*, p. 47. See also Brown, *Mobile Professors*, p. 7, and Bernard, *Academic Women*, p. 148.
[73] Brown, *Mobile Professors*, pp. 76–78. See also Lester, *Antibias Regulation*, p. 42.
[74] Bernard, *Academic Women*, p. 180; Brown, *Mobile Professors*, p. 81; Helen S. Astin and Alan E. Bayer, "Sex Discrimination in Academe," *Educational Record*, Spring 1972, p. 103; Helen S. Astin, *The Woman Doctorate in America* (New York: Russell Sage Foundation, 1970), pp. 20–21.
[75] Bernard, *Academic Women*, pp. 151–152.
[76] Astin, *The Woman Doctorate*, p. 73; Lester, *Antibias Regulation*, p. 42.
[77] Brown, *Mobile Professors*, pp. 79–80.

than do academic men. This takes many forms, including quitting jobs they like because their husbands take jobs elsewhere,[78] interrupting their careers for domestic reasons,[79] withdrawing from the labor force (25 percent of women Ph.D.s),[80] doing a disproportionate share of household and social chores compared to their husbands in the same occupations,[81] and a general attitude reported by women themselves of putting their homes and families ahead of their careers much more often than do male academics.[82] All this goes to the heart of the question of the actual source of sex differentiation—whether it is the home or the work place, and therefore whether "equal treatment" as required by the Constitution and envisioned in the Civil Rights Act would eliminate or ensure unequal results by sex.

None of these factors disproves the existence of sex discrimination; but they do mean that attempts to measure sex discrimination must be unusually careful in specifying the relevant variables which must be equal remaining inequalities can be considered "discrimination." *Unfortunately, such care is not evident in HEW pronouncements* or in much of the literature supporting affirmative action. Even the comprehensive studies by Helen S. Astin and Alan E. Bayer make the fatal mistake of holding marital status constant in comparing male-female career differences.[83] But marriage has *opposite* effects on the careers of male and female academics, advancing the man professionally and retarding the woman's progress. Not only do the men and women themselves say so,[84] but the Astin-Bayer data (and other data) also show it.[85] Therefore, to treat as "discrimination" all residual differences for men and women of the "same" characteristics—including marriage—is completely invalid and misleading.

Marriage is a dominant—and negative—influence on academic women's careers. A study of academics who had received their Ph.D.s many years earlier showed that 69 percent of the total—mostly men—had achieved the rank of full professor, as had 76 percent of the single women but only 56 percent of the married women.[86] In short, many of the statistical differences between the broad categories "men" and "women" are to a large extent simply differences between married

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[78] Barbara B. Reagan, "Two Supply Curves for Economists? Implications of Mobility and Career Attachment of Women," *American Economic Review*, vol. 65, no. 2 (May 1975), pp. 102, 103. See also Astin, *The Woman Doctorate*, p. 102.

[79] Reagan, "Two Supply Curves," p. 104.

[80] Brown, *Mobile Professors*, p. 78.

[81] Bernard, *Academic Women*, p. 221; Lester, *Antibias Regulation*, p. 39.

[82] Reagan, "Two Supply Curves," p. 103. See also Bernard, *Academic Women*, pp. 151–152, 181–182; Astin, *The Woman Doctorate*, pp. 91–92.

[83] "The regression weights of the predictor variables that emerged in the analysis of the men's sample were applied to the data for the women's sample to assess the predicted outcome when the criteria for men were used. . . .To award women the same salary as men of similar rank, background, achievements and work settings. . .would require a compensatory average raise of more than $1,000. . . ." Astin and Bayer, "Sex Discrimination in Academe," p. 115.

[84] Bernard, *Academic Women*, p. 217.

[85] Astin and Bayer, "Sex Discrimination in Academe," p.111; Lester, *Antibias Regulation*, pp. 36–37.

[86] Helen S. Astin, "Career Profiles of Women Doctorates," *Academic Women on the Move*, ed. Alice S. Rossi and Ann Calderwood (New York: Russell Sage Foundation, 1973), p. 153.

women and all other persons. It is an open question how much of the residual disadvantages of single academic women are based upon employer fears of their becoming married academic women and acquiring the problems of that status. One indication of the difficulty of successfully combining academic careers with the demands of being a wife and mother is that academic women are married much less frequently than either academic men or women Ph.D.s in nonacademic fields,[87] are divorced more frequently,[88] and have fewer children than other female Ph.D.s.[89]

Much of the literature on women in the labor market denies that "all" women, "most" women, or the "typical" woman represent special problems of attrition, absenteeism, and other characteristics reflecting the special demands of home on women. For example, the "typical woman economist" has not given up her job to move because of her husband's move, but 30 percent of the women economists do, while only 5 percent of male economists accommodate their wives in this way.[90] Similarly, while most female Ph.D.s in economics have not interrupted their careers, 24 percent had interrupted their careers prior to receiving the degree (compared to 2 percent of the men) and "another 20 percent" afterwards (compared to 1 percent of the men).[91] These are clearly substantial percentages of women and several-fold differentials between men and women.

The literature on women workers in general makes much of the fact that *most* women "work to support themselves or others," not just for incidental money.[92] However, this does not alter the facts (1) that women's labor force participation rates are substantially lower than men's[93] and (2) that married women's labor force participation declines as their husbands' incomes rise.[94] This is also true of academic women.[95]

In considering global male-female differences in career results, the question is not whether "most" women have certain negative career characteristics but whether a significant percentage do and whether that percentage is substantially different from that of men. Moreover, it is not merely the individual negative characteristics that matter but their cumulative effects on male-female differentials in employment,

[87] Lester, *Antibias Regulation*, p. 41.
[88] Bernard, *Academic Women*, pp. 113, 206.
[89] Ibid., p. 216.
[90] Reagan, "Two Supply Curves," pp. 101–03.
[91] Ibid., p. 104.
[92] U.S. Department of Labor, *Underutilization of Women Workers* Washington, D. C.: U.S. Government Printing Office, n.d.), p. 1.
[93] William G. Bowen and T. Aldrich Finegan, *The Economics of Labor Force Participation* (Princeton: Princeton University Press, 1969), pp. 41, 101, 243.
[94] Ibid., p. 132.
[95] Astin, *The Woman Doctorate*, p. 60.

pay, and promotion. Nor can these differences in career characteristics be dismissed as subjective employer perceptions or aversions.[96] They represent in many cases *choices* made outside the work place which negatively affect women's career prospects. As one woman researcher in this area has observed: "One way of insuring that the academic husband's status will be higher than his academic wife's is to allow the husband's job opportunities to determine where the family lives."[97] But regardless of the wisdom or justice of such a situation, *it is not employer discrimination,* even though it may lead to statistical male-female differences between persons of equal ability.

One of the fertile sources of confusion in this area is the thoughtless extension of the "minority" paradigm to women. It makes sense to compare blacks and whites of the same educational levels because education has the same positive effect on black incomes and white incomes, though not necessarily to the same extent. It does *not* make sense to compare men and women of the same marital status because marital status has opposite effects on the careers of men and women. Minorities have serious problems of cultural disadvantages, so that faculty members from such groups tend to have lower socioeconomic status and lower mental test scores than their white counterparts,[98] and black colleges and universities have never been comparable to the best white colleges and universities,[99] whereas female academics come from *higher* socioeconomic levels than male academics,[100] female Ph.D.s have higher IQs than male Ph.D.s in field after field,[101] and the best women's colleges have had status and student SAT levels comparable to those of the best male or coeducational institutions. Women have been part of the cultural, informational, and social network for generations, while blacks and even Jews have been largely excluded until the past generation. While minorities have been slowly rising in professional, technical, and other high-level positions over the past 100 years, women have declined in many such areas over the same period, even in colleges institutionally operated by women,[102] so that employer discrimination can hardly explain either the trend or the current level of "utilization" of women. Marriage and childbearing trends over time are highly correlated with trends of women's participation in high-level occupations, as well as being correlated with intragroup differ-

[96] Jerolyn R. Lyle and Jane L. Ross, *Women in Industry* (Lexington, Mass.: D. C. Heath and Co., 1973), p. 13; Reagan, "Two Supply Curves," p. 104.

[97] Quoted in Reagan, "Two Supply Curves," p. 102.

[98] Horace Mann Bond, *A Study of the Factors Involved in the Indentification and Encouragement of Unusual Academic Talent among Underprivileged Populations* (U.S. Department of Health, Education, and Welfare, Project no. 5-0859, Contract no. SAE 8028, January 1967), p. 117.

[99] Sowell, *Black Education*, pp. 255–259; Jencks and Riesman, "The American Negro College."

[100] Bernard, *Academic Women*, pp. xx, 77–78; Alan E. Bayer, *College and University Faculty: A Statistical Description* (Washington, D. C.: American Council on Education, June 1970), p. 12; Astin, *The Woman Doctorate*, pp. 23, 25.

[101] Bernard, *Academic Women*, p. 84.

[102] Ibid., pp. 39–44.

ences among women at a given time. In short, women are not another "minority," either statistically or culturally.

When male-female comparisons are broken down by marital status and other variables reflecting women's domestic responsibilities, some remarkable results appear. Although women in the economy as a whole earn less than half as much annually as men,[103] with this ratio *declining* from 1949 to 1969,[104] the sex differentials narrow to the vanishing point—and in some cases are even reversed—when successive corrections are made for marital status, full-time as against part-time employment, and continuous years of work. For example, in 1971 women's median annual earnings were only 40 percent of those of men, but when the comparison was restricted to year-around, full-time workers, the figure rose to 60 percent, and when the comparison was between single women and single men in the same age brackets (30 to 44) with continuous work experience, "single women who had worked every year since leaving school earned slightly more than single men."[105] These are government data for the economy as a whole.

The severe negative effect of marriage on the careers of women is not a peculiarity of the academic world. Other nationwide data on sex differences show single women's incomes ranging from 93 percent of single men's income at ages 25 to 34 to 106 percent in ages 55 to 64[106]—that is, after the dangers of marriage and children are substantially past. For women already married, the percentages are both lower and decline with age—ranging from 55 percent of married men's incomes at ages 25 to 37 to only 34 percent at ages 55 to 64.[107] Apparently early damage to a woman's career is not completely recouped—at least not relative to men who have been moving up occupationally as they age while their wives' careers were interrupted by domestic responsibilities. In the early years of career development, single women's labor force participation rates are rising sharply, while those of married women are declining sharply.[108] Again, the data suggest that what are called "sex differences" are largely differences between married women and all others, and that the origin of these differences is in the division of responsibilities in the family rather than employer discrimination in the work place. The increasing proportion of married women in the work force over time[109] has been a major factor in the decline of the earnings of women relative to men.

[103] James Gwartney and Richard Stroup, "Measurement of Employment Discrimination According to Sex," *Southern Economic Journal*, vol. 39, no. 4 (April 1973), pp. 575–576; and "The Economic Role of Women," in the *Economic Report of the President, 1973* (Washington, D. C.: U.S. Government Printing Office, 1973), p. 103.
[104] Gwartney and Stroup, "Employment Discrimination," p. 583.
[105] "The Economic Role of Women," p. 105.
[106] Gwartney and Stroup, "Employment Discrimination," p. 582.
[107] Ibid.
[108] Kreps, *Sex in the Marketplace*, p. 32.
[109] Ibid., pp. 4, 19.

Academic women show similar patterns. For example, the institutional employment of married women is "determined to a large extent" by the location of their husbands' jobs,[110] and this contributes to a lower institutional level for academic females than for male Ph.D.s. Academic women apparently find it harder than other women of similar education to combine marriage and a career. One study of "biological scientists receiving their degrees during the same time period" found only 32 percent of such academic women married compared to 50 percent of their nonacademic counterparts, even though initially virtually identical percentages were married before receiving their Ph.D.[111] A more general survey of women holding doctorates found only 45 percent to be married and living with their husbands.[112] Although there were more married than single women among women doctorates in general,[113] in the academic world there were more single than married female doctorates.[114] Moreover, female academics had divorce rates several times higher than male academics.[115] Another study of college teachers found 83 percent of the men but only 46 percent of the women to be married.[116] Women in other high-level, high-pressure jobs requiring continuous full-time work show similarly low proportions married.[117]

Childbearing is also negatively associated with career prospects. Among Radcliffe Ph.D.s, those working full time had the fewest children, those working part time next, those working intermittently next, and those not working at all had the most children.[118] Various surveys show that "female Ph.D.s who are married are twice as likely to be childless as women in the same age group in the general population" and even when they do have children, to have fewer of them.[119] The husband's prospects also have a negative effect on women doctorates' careers: A woman married to a "highly educated man with a substantial income was less likely to work" or, if she did, was more likely to take a part-time job.[120] This parallels a negative correlation between married women's labor force participation and their husbands' incomes in the general economy.[121]

In research output, "the woman doctorate who is married and has children was less likely than the single woman doctorate or a childless

[110] Bernard, *Academic Women*, p. 88.
[111] Ibid., p. 113.
[112] Astin, *The Woman Doctorate*, p. 27.
[113] Ibid.
[114] Ibid., p. 71.
[115] Bernard, *Academic Women*, p. 216.
[116] Ibid., p. 313.
[117] Ibid., pp. 313–314.
[118] Ibid., p. 241.
[119] Lester, *Antibias Regulation*, p. 38.
[120] Astin, *The Woman Doctorate*, p. 60.
[121] Bowen and Finegan, *Labor Force Participation*, p. 132.

married woman doctorate to have many scientific and scholarly articles to her credit."[133] It is not surprising that the married woman doctorate "tended to make a lower salary than the single woman, even if she was working full time."[127] Unfortunately, studies of academic women have not simultaneously controlled for marital status, full-time continuous employment, publications, and degree level and quality.

The National Academy of Science data permit comparisons of the salaries of male and female doctorates who worked full time both in 1960 and in 1973 and who responded to all the biennial surveys of the National Science Foundation from 1960 through 1973 (see table 6). This gives an approximation of full-time continuous employment, but does not show whether the respondent was employed full time in each of the years during which a survey was made or whether the respondent worked at all in the nonsurvey years. These data show female salaries at 83 percent of male salaries in 1970 (before affirmative action) and 84 percent in 1973 (after affirmative action)—a smaller proportion than in other data which controlled for other variables such as publications and degree quality. It also indicates no discernible effect of affirmative action programs.

A 1968 study of full-time academic doctorates found women's salaries ranging from 89 percent to 99 percent of men's salaries in the same field, with similar length of employment, and in broadly similar institutions (colleges versus universities).[134] These higher percentages—as compared with the results in table 6—suggest that the distribution of women by institutional type and ranking and by years of employment explains a significant part of the male-female salary differences among academics. Moreover, since women academics with Ph.D.s in this 1968 study earned 92.2 percent of the income of men academics with Ph.D.s (even without controlling for publications), these figures indicate how small the sex differential was for even roughly similar individuals before affirmative action.

Even more revealing patterns appear in our tabulations of ACE data by marital status (table 7). In 1969, academic women who never married earned slightly more than academic men who never married. This was true at top-rated institutions and at other institutions, for academics with publications and for academics without publications. The male salary advantage exists solely among married academics and among those who used to be married ("other" includes widowed, divorced, etc.). The male advantage is greatest among those married and with dependent children. Being married with children is obviously the greatest inhibitor of a woman's career prospects and the greatest incentive to a man's. The salaries of women who never married were

[133] Astin, *The Woman Doctorate*, p. 82.
[127] Ibid., p. 90.
[134] Bayer and Astin, "Sex Differences in Academic Rank and Salary among Science Doctorates in Teaching," *Journal of Human Resources*, vol. 3, no. 2 (Spring 1968), p. 196. "Science" in the title includes the social sciences.

Table 6

MALE-FEMALE SALARY RELATIONSHIPS (1970 AND 1973) AMONG FULL-TIME DOCTORATES INCLUDED IN ALL 1960–73 NSF SURVEYS

Fields	Average Annual Salary	
	1970	1973
NATURAL SCIENCES		
Men	$20,646	$24,854
Women	$17,061	$20,718
Ratio of women/men	.83	.83
SOCIAL SCIENCES		
Men	$21,442	$26,537
Women	$17,171	$21,027
Ratio of women/men	.80	.80
TOTAL[a]		
Men	$20,508	$24,851
Women	$17,073	$20,910
Ratio of women/men	.83	.84

[a] Includes miscellaneous fields as well as the natural sciences and the social sciences.

Source: National Academy of Sciences.

104 percent of the salaries of their male counterparts at the top-rated institutions and 101 percent at other institutions. For women who were married but had no dependent children, the percentages fell to 88 and 84 percent, respectively. For married women with dependent children, the percentages fell still further, to 69 and 70 percent. For women and men without publications and in nonranked—essentially nonresearch—institutions, the "never married" women earned 145 percent of the "never married" men's incomes—confirming a general impression that women prefer teaching institutions, and therefore a higher proportion of top-quality women than of top-quality men end up at such places by choice. It also suggests that employers are not unwilling to recognize such quality differentials with salary differentials in favor of women.

In the literature on sex differentials and in the pronouncements of governmental agencies administering affirmative action programs, sinister and even conspiratorial theories have been advanced to explain very ordinary and readily understandable social phenomena: (1) academic individuals who are neither aiding nor aided by a spouse make very similar incomes, whether they are male or female; (2) academic individuals who are aided by a spouse (married males) make more than unaided individuals; and (3) academic individuals who aid a spouse (married females) make less for themselves than do the other categories of people. The social mores which lead women to sacrifice their careers for their husbands' careers may be questioned (as should the high personal price exacted from academic career women, as reflected in their lower marriage and higher divorce rates). But social mores are not the same as employer discrimination. The fact that single academic women earn slightly higher salaries than single academic men suggests that employer discrimination by sex is not responsible for male-female income differences among academics. Moreover, even as regards social mores, it must be noted that academic women report themselves satisfied with their lives a higher percentage of the time than do academic men[125]—a phenomenon which some explain by saying that women do not put all their emotional eggs in one basket as often as men,[126] and which others explain by treating high research creativity as a somewhat pathological and compensatory activity of the personally unfulfilled.[127] The point here is that the evidence is not all one way, nor the logic overwhelming, even as regards apparently inequitable social mores. On the basic policy issue of employer discrimination, such evidence as there is lends no support to this as an explanation of male-female career differences, and the slight but persistent advantage of single females over single males undermines the pervasive preconception that employers favor men when other things are equal.

[125] Bernard, *Academic Women*, p. 182.
[126] Ibid., p. 152.
[127] Ibid., p. 156.

Table 7

ACADEMIC-YEAR SALARIES BY SEX AND MARITAL STATUS, 1968–69

Sex and Marital Status	Total				With Publications				Without Publications			
	Top institutions		Other institutions		Top institutions		Other institutions		Top institutions		Other institutions	
	Salary	Number	Salary	Number	Salary	Number	Salary	Number	Salary	Number	Salary	Number
MEN												
Total	$13,704	26,493	$13,245	307,323	$13,697	26,033	$13,230	301,251	$14,075	459	$13,965	6,071
Presently married	13,562	23,623	13,175	280,637	13,549	23,209	13,159	275,248	14,323	413	13,969	5,389
With dependent children	14,180	15,996	13,636	200,570	14,179	15,728	13,623	196,640	14,242	267	14,273	3,929
Without dependent children	12,266	7,627	12,018	80,067	12,223	7,481	11,997	78,607	14,472	145	13,150	1,459
Never married	11,070	142	10,525	3,737	11,070	142	10,569	3,629	0	0	9,027	107
Other	15,065	2,727	14,548	22,947	15,120	2,681	14,540	22,373	11,838	45	14,856	573
WOMEN												
Total	11,030	4,166	10,359	75,044	11,003	4,062	10,345	73,155	12,094	103	10,889	1,888
Presently married	10,264	2,339	10,021	60,484	10,213	2,753	10,012	59,016	11,875	86	10,403	1,467
With dependent children	9,727	1,255	9,645	17,246	9,626	1,207	9,640	16,734	12,255	48	9,809	511
Without dependent children	10,690	1,583	10,171	43,238	10,672	1,545	10,159	42,282	11,394	37	10,721	956
Never married	11,523	404	10,566	5,174	11,363	399	10,455	4,954	22,499	5	13,075	219
Other	13,176	921	12,419	9,384	13,236	909	12,427	9,184	8,633	11	12,045	200

Note: Data cover all races and all disciplines.

Source: American Council on Education.

IV. The Implications

The academic profession has been chosen as an area in which to study the necessity and effectiveness of affirmative action programs, primarily because it is an area in which crucial career characteristics can be quantified and have been researched extensively over the years. The questions are: (1) What are the implications of affirmative action in the academic world? (2) To what extent is the academic world unique—or, to what extent are these research findings applicable to the economy at large? (3) Both for the academic world and for the economy at large, what alternative policies offer a better prospect of achieving the general goal of equal opportunity which provides much of the driving force behind the particular policies and practices summarized as affirmative action?

Academia. The central assumption of affirmative action programs is that "underrepresentation" of minorities or women represents employer "exclusion" rather than different career characteristics of groups or different choices by the individuals themselves. In the academic world, major intergroup differences have been found in degree levels, publications, and fields of specialization— all these differences being to the disadvantage of minorities and women. For minorities, holding such variables constant reduces, eliminates, or even reverses salary differentials as compared to white academics. Even without holding such variables constant, the pay differentials between minorities and other academics were less than $100 per year *before* affirmative action and less than $1,000 afterwards—indicating that both the necessity for such programs and the effectiveness of them are open to serious question. For women, holding the same variables constant does not eliminate salary differentials, but holding full-time employment constant comes close to doing so, and for those women without marital responsibilities, sex differentials disappear. Together with much other data, this suggests that marital status in general and an unequal division of domestic responsibility in particular explain both differential trends over time and the differences at a given time between male and female academics.

The term "career characteristics" has been used here, not simply to avoid the emotionally loaded word "qualified," but because it seems more accurate and germane. Given the enormous range of American colleges and universities, virtually anyone with graduate training is "qualified" to teach somewhere, while only a small fraction of the Ph.D.s are "qualified" to teach at the very top institutions. The question of qualifications, therefore, amounts to a question of whether a particular individual matches a particular institution, rather than whether he or she belongs in the profession. An institution is not excluding a "qualified" applicant because it hires someone else whose career characteristics fit its institutional needs, even though those not

hired have career characteristics which make them valuable to other kinds of institutions. Research universities—a major focus of affirmative action programs—offer a specialized environment which many academics do not want, as well as one for which many do not have the appropriate set of career characteristics. It is as unnecessary to denigrate either individuals or groups as it is to denounce as "irrelevant" the characteristics which research universities seek for their special purposes.

The crucial element of individual choice is routinely ignored in analyses and charges growing out of statistical distributions of people. Women *choose* to emphasize teaching over research, and this has implications for their degree levels (a Ph.D. is not as essential), the kind of institutions they prefer, and the lifestyle it permits— including part-time and intermittent careers that mesh with domestic life. Black faculty *prefer* being where they are to such an extent that it would take more than a $6,000 raise to move them, according to a survey of several hundred black academics.

One of the peculiarities of the academic market is its fragmentation or balkanization.[128] A particular department typically hires people trained at a relatively small number of other departments. This is due to the high cost of specific knowledge about specific individuals as they emerge from graduate school. At that point, the individual usually has no publications or teaching experience, and the only indications of his intellectual potential are the estimates of professors who taught him or directed his thesis research—and the value of those estimates depends crucially upon the reliability of those professors, which in turn means it depends on how well members of the employing department know members of the department where the applicant was trained. The top departments in many fields typically hire from other top departments in the same fields. This has led to charges of an "old boy network" among the top departments which excludes outsiders in general and minorities and women in particular. But despite loose talk about "recruitment procedures that tend exclusively to reach white males,"[129] the fact is that (1) most black Ph.D.s were trained in a very few *highly rated,* predominantly white departments[130] and (2) a slightly higher proportion of female doctorates than of male doctorates received their Ph.D.s from the top 12 universities.[131] In short, whatever the merits or demerits of the "old boy network," as high a percentage of minority and female Ph.D.s as of white male Ph.D.s are inside its orbit.

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[128] Brown, *Mobile Professors,* chap. 4.

[129] J. Stanley Pottinger, "The Drive Toward Equality," *Change,* vol. 4, no. 8 (October 1972), p. 24.

[130] At the Ph.D. level blacks tend to receive their degrees from large, prestigious, predominantly white institutions of higher learning outside the South. Mommsen, "Black Ph.D.s," p. 256. Fifty percent of all black Ph.D.s come from just 10 institutions (p. 257). By comparison, for academics in general, "the ten top-producing universities granted 35.8 percent of the doctorates. . . ." Brown, *Mobile Professors,* p. 45.

[131] Bernard, Academic Women, p. 87.

Affirmative action practices ignore both choice and career characteristics by the simple process of putting the burden of proof on academic institutions to explain why their percentages of minority and female faculty do not match the kinds of proportions preconceived by governmental authorities. Career characteristics are accepted as mitigating factors only when job criteria have been "validated"—which is virtually impossible. The statistical "validation" process, as developed for written tests in education, involves prediction for a very short span of time on a very limited number of variables, such as grades and graduation. To extend the "validation" concept to the whole hiring process for complex professions with many dimensions is to demand mathematical certainty in areas where good judgment is the most that can be expected. In such circumstances, where "validation" amounts to convincing Government officials, it means convincing people whose own career variables—appropriations, staff, and power—depend upon not believing those attempting to convince them. General findings of reasonable hiring decisions would be a general sentence of death for the agency itself. More basically, this situation replaces the principle of prescriptive laws with *ex post* administrative determination of what should have happened, combined with never-ending burdens of proof as to why it did not.

A mitigating factor (in the opinion of some) is that the ultimate sanction of contract cancellation is not actually invoked. But this means that the real penalty is having to repeatedly devote substantial institutional resources to producing the pounds of paper which constitute an affirmative action report—and this penalty falls equally on the just and on the unjust. Even aside from the disturbing moral implications of this, it means that the *effectiveness* of the penalty is reduced when a discriminating employer has little to gain by becoming a nondiscriminating employer, in a society where the career characteristics of the target population ensure that he will never be able to fill affirmative action quotas anyway. There is truth in the bitter comments from both sides of the affirmative action controversy that (1) colleges and universities are under unremitting and unreasonable pressures and that (2) virtually nothing is actually being accomplished for minorities and women. An even weightier consideration is that the *appearance* of massive benefits being conferred on minorities and women undermines the very real achievements of minorities and women themselves, often made at great personal sacrifice—achievements whose general recognition would be a very healthy influence on society at large.

There are a number of ways in which affirmative action programs hurt the academic world without benefiting minorities or women:

(1) The sheer volume of resources required to gather and process data, formulate policies, make huge reports (typically weighing several pounds), and conduct interminable communications with a variety of Federal officials is a large, direct, and unavoidable cost to

the institution—whether or not it is guilty of anything, and whether or not any legal sanction is ever imposed.

(2) The whole academic hiring process is changed by outside pressures, so as to generate much more paperwork as evidence of "good faith" hiring efforts and in general to become slower, more laborious, more costly, and less certain—even where the individual eventually hired is a white male, as is in fact typically the case. It is *not* that it costs more to hire minorities or women, but that it becomes more costly to hire *anyone*.

(3) Faculty decisionmaking on hiring, pay, and promotion is increasingly being superseded by administrative determination, in response to affirmative action pressures on academic institutions. The historic informal balance of power is being shifted away from those with specific expertise in their fields to those who feel outside pressures to generate either acceptable numbers or acceptable procedures, excuses, or promises. The bitterness and demoralization generated by this undermining of traditional faculty autonomy occurs whether or not any minority or female faculty members are eventually hired.

(4) The "up-or-out" promotion and tenure policies of top research universities have meant in the past essentially a "no-fault" termination of untenured faculty members, who typically go on to have successful careers at other institutions. Now the threat of "discrimination" charges based on nothing more than statistics forces an accumulation of evidence as potential "justification"—with both financial and morale costs to individuals and institutions.

In short, many—if not most—of the costs of affirmative action imposed by the Government on academic institutions do not represent gains by minorities or women, but simply burdens and losses sustained by the whole academic community.

What is most lacking in the arguments for affirmative action programs is a detailed specification of who is expected to benefit, in what manner, with what likelihood, and at what risk of negative effects on net balance. The potential beneficiaries in the academic world might be existing minority or female academics, and the specific benefits might be financial or psychic, through working at more prestigious institutions. Of course, the possibility of financial or psychic loss should also be considered, but seldom is. Perhaps *future* minority or female academics might be expected to receive financial or psychic benefits—or to lose in either or both respects. Or perhaps minorities and females as groups are expected to benefit financially or psychically from any increase in the numbers or standings of the members of these groups or in the academic world—and again, this prospect of the reverse has to be considered. Some have argued that minorities or female students benefit from seeing "role models" or that white male students benefit equally from seeing minorities or women successful in spite of

stereotypes. Let us briefly examine each of these possibilities, its likelihood, and the likelihood of the opposite.

First, minority or female faculty as potential beneficiaries. Our data show no reason to single out these well-paid professionals as a "disadvantaged" group, either absolutely or relative to white males with the same career characteristics. But assume that we wish to do so anyway. The data show no evidence of any significant group-wide advance in pay after affirmative action. What of prestige? Most black faculty apparently think so little of it as to be unwilling to leave their present jobs—overwhelmingly at black institutions—without very large financial compensation for the move. Female academics have a long history of giving a low rating to academic prestige as a source of career satisfaction.[132] In short, the benefits expected to be conferred by affirmative action have not in fact been conferred, nor is there much evidence that they were much desired by the supposed beneficiaries. Perhaps future minority and female academics will be different—but they will enter an academic world where attitudes toward them will have been shaped by present policies on minorities and women, which means facing the resentment, doubts, and presumptions of incompetence spawned by the bitter controversy surrounding this basically ineffective program.

Second, as for general image upgrading for the benefit of the group as a whole or of society, this can hardly be expected in such an atmosphere. Indeed, the emphasis on the Government's conferring a benefit on minorities and women amounts almost to a moratorium on recognition of *achievements* by such groups, for their achievements tend to be subsumed under the notion of conferred benefits. Certainly there is no clear-cut way to separate the two in practice. How can this upgrade images or improve intergroup relations? No small part of the very real benefits of working in a top research university consists of the *voluntary* cooperation and mutual interest of academic colleagues. Already there have been bitter complaints by minority faculty concerning their reception by colleagues,[133] indicating how little can be expected from merely shoe-horning someone into a given setting under Government auspices.

What is particularly ominous is that the affirmative action pressures are occurring during a period of severe academic retrenchment under financial stress. Many thousands of well-qualified people of many descriptions were bound to have their legitimate career expectations bitterly disappointed, whether there was affirmative action or not. Affirmative action, however unsuccessful at really improving the positions of minorities and women, gives these disappointed academics

[132] Brown, *Mobile Professors*, pp. 79–80.

[133] Moore and Wagstaff, *Black Educators in White Colleges*, pp. 26, 131, 198–199; Richard L. Garcia, "Affirmative Action Hiring," *Journal of Higher Education*, vol. 14, no. 4 (April 1974), pp. 268–272.

and would-be academics a convenient focus or scapegoat for their frustrations.

The Economy. To what extent can the patterns found in the academic profession be generalized to the larger society? That question can be answered only after applying a similar approach to the economy as a whole—that is, going beyond the global black-white or male-female comparisons to comparisons of segments carefully matched for the relevant variable. For women, such matching eliminates sex differentials among continuously employed single individuals.[134] Among blacks, college-educated men had achieved starting salary equality by 1970,[135] with "virtually all of the improvement in relative income" occurring "after passage of the 1964 Civil Rights Act"[136] but before affirmative action quotas under Revised Order No. 4 in 1971. For black male workers as a whole, firms with Government contracts showed a larger increase in the earnings of black workers relative to the earnings of whites than firms without Government contracts, but this difference "accounts for only about 6% of the overall change in the relative position of black workers."[137] In short, it was *antidiscrimination* or equal opportunity laws, not goals or quotas, that made the difference. Another way of looking at this is that blacks *achieved* when given equal opportunity, and were not passive beneficiaries of conferred gains.

While only segments of minority and female populations have achieved income equality with their white male counterparts, the differences between these segments and other segments of the same populations give clues as to the *causes* of the remaining inequalities. For example, as noted above, marital status is as crucial a variable among women in general as it is among academic women in particular. Among married women, labor force participation declines as the husband's income rises, both in the general economy and in the academic world.[138] Children have a negative effect on work participation for women in general as well as for academic women.[139] As for trends over time, there has been a generally declining trend in the proportion of women in various high-status occupations since around 1930, coinciding with earlier marriages and the baby boom,[140] but this trend began to reverse— *before* affirmative action. For example, the proportion of

[134] "The Economic Role of Women," p. 105.
[135] R. B. Freeman, "Labor Market Discrimination: Analysis, Findings, and Problems," *Frontiers of Quantitative Economics*, ed. M. D. Intriligator and D. A. Kendrick (Amsterdam: North Holland Publishing Company, 1974), vol. 2, p. 508.
[136] Ibid., pp. 508–509.
[137] Orley Ashenfelter, "Comments," *Frontiers of Quantitative Economics*, vol. 2, p. 558.
[138] "The Economic Role of Women," p. 96; Bowen and Finegan, *Labor Force Participation*, p. 132; Astin, *The Woman Doctorate*, pp. 60, 61.
[139] Bowen and Finegan, *Labor Force Participation*, pp. 96–105; "The Economic Role of Women," pp. 93–95; Bernard, *Academic Women*, pp. 220–222.
[140] Bernard, *Academic Woman*, pp. 62, 74, 215.

"professional and technical workers" who were female was 39.0 in 1950, 38.4 in 1960, and 39.9 in 1970.[141] The proportion of "college presidents, professors and instructors" who are female was 31.9 percent in 1930, falling to a low of 24.2 percent in 1960, and rising slightly to 28.2 percent in 1970.[142]

Among blacks, income parity has been achieved not only by college-educated men (and slightly more than parity achieved by college-educated black women)[143] but also by young (under 35) intact husband-wife families outside the South.[144] For the latter, this parity was achieved in 1971, but this could hardly have been a result of goals and timetables formulated in *December* 1971 and implemented the following year. Another way of looking at the still substantial black-white income inequalities is that these inequalities exist among older blacks, blacks in the South, in "broken" families, and among the less educated. There remains a substantial agenda for further progress, but the record shows that the progress that has already occurred was the result of antidiscrimination or equal-opportunity pressures which allowed blacks to achieve sharply rising income relative to the income of whites in a few years, after decades of stagnation in the same relative position.[145] The ratio of black family income to white family income reached a peak in 1970—before affirmative action—and has *declined* slightly in 1971 and 1972.[146] It is unnecessary to blame affirmative action for the decline. It is enough that there is no evidence that goals and timetables produced any further advance, but only cast doubt on, and caused interracial bitterness over, what blacks had already achieved themselves without quotas.

Policy. The long and virtually complete exclusion of outstanding black scholars from all of the leading universities in the United States until the past generation[147] suggests that market forces alone were not enough to open up opportunities in this nonprofit sector. Indeed, economic principles would suggest that nonprofit sectors in general are less likely than other sectors to reduce discrimination in response to economic forces alone[148]—and this includes government, both local[149] and national.[150] The question is not whether there is a legitimate role for Government to play in reducing discrimination, but how Government should carry out its responsibilities. Affirmative action came

[141] "The Economic Role of Women," p. 155.
[142] Ibid., p. 101.
[143] Freeman, "Labor Market Discrimination," p. 506.
[144] Wattenberg, *The Real America*, p. 128.
[145] Freeman, "Labor Market Discrimination," pp. 504, 506.
[146] Wattenberg, *The Real America*, p. 125.
[147] Winston, "Through the Back Door."
[148] Armen A. Alchian and Reuben A. Kessel, "Competition, Monopoly, and the Pursuit of Money," in *Aspects of Labor Economics*, A report of the National Bureau of Economic Research (Princeton: Princeton University Press, 1962), pp. 157–175; Thomas Sowell, *Race and Economics* (New York: David McKay Co., 1975), pp. 166–169.
[149] Freeman, "Labor Market Discrimination," pp. 549–555.
[150] Sowell, *Race and Economics*, chap. 7.

along *after* a series of antidiscrimination laws and a change of public opinion. It must be judged against that background, not against a background of uninhibited discrimination in earlier eras, as its proponents like to judge it.

The crucial issue of principle is whether the focus of governmental efforts shall be statistical categories or individual rights. The crucial, practical issue is who shall bear the burden of proof—the Government or those subject to its power?

Categories and statistics are a bottomless pit of complications and uncertainties. For example, an economics department with a job opening is not looking for an "economist," or even for a "qualified" economist; it is looking for an international trade specialist with an econometrics background or a labor economist familiar with manpower programs, etc. Statistics on how many "qualified" minority or female "economists" in general are "available" are meaningless. Neither minorities nor women are randomly distributed by field or within fields. Female economists, for example, are not distributed the same way as male economists among specialties.[151] Even to define the relevant pools for purposes of realistic goals and timetables is impossible, even if all the statistics on the profession are at one's fingertips and completely up to date—as they never are. No department can predict in which subspecialty its vacancies are going to occur, for that involves predicting which particular members of its own department will choose to leave– and in an era of retrenchment, vacancies have more effect on hiring than does the creation of new positions.

Statistical "laws" apply to large numbers of random events. But *universities* do not hire large numbers of random academic employees; *departments* each hire small numbers of specialists within their respective fields. To establish numerical goals and timetables for such small-sample unpredictable events is to go beyond statistics to sweeping preconceptions. Nowhere can one observe the random distribution of human beings implicitly assumed by affirmative action programs. Mountains of research show that different groups of people distribute themselves in different patterns, even in voluntary activities wholly within their control, such as choice of card games or television programs, not to mention such well-researched areas as voting, dating, childrearing practices, etc.

The American system of justice puts the burden of proof on the accuser, but this principle has been reversed in practice by agencies administering affirmative action programs. Those subject to their power must prove that failure to achieve the kinds of employment proportions preconceived by the agency is innocent in general, and in particular colleges and universities must "validate" their job criteria—

[151] Myra H. Strober, "Women Economists: Career Aspirations, Education, and Training," *American Economic Review*, vol. 65, no. 2 (May 1975), p. 96.

even if the Government administrators could never do the same for their own jobs. No proof—or even hard evidence—was necessary for the agencies to demonstrate that the academic situation involved individual discrimination rather than statistical patterns reflecting general social conditions outside the institution. Any policy which is to claim respect as a prescriptive law must put the burden of proof back on the Government, where it belongs.

A change from categorical statistical presumptions to evidence on individual cases requires a knowledge of academic norms and practices going well beyond the expertise of nonacademic Government officials. The lack of such knowledge by those administering "guidelines" for higher education has been a bitter complaint among academics.[152] Certainly it is revealing when J. Stanley Pottinger can refer to the university "personnel officer" as hiring agent,[153] when faculty hiring is in fact done by individual departments, with the candidates having little or no contact with "university" officials before being hired. In any event, if professional judgments are to be subject to review in cases where discrimination is charged, that review requires at least equally qualified professionals as judges. Since academic disciplines have their own respective professional organizations—the American Economic Association, the American Sociological Association, etc.—these organizations could readily supply panels of experts to review the reasonableness of the decisions made in disputed cases. If academic freedom and faculty self-governance are to be maintained, such a review must determine whether the original hiring decision fell within the reasonable range, not substitute the choice of the panel for the choice of the department.

The great problem with individual case-by-case adjudication is the backlog that can be generated—to the detriment of all and perhaps fatally so for the effectiveness of the program. There are some countervailing factors in the case of judgments by a panel of experts. First of all, the panel can quickly dismiss frivolous claims—especially where the claim must be based on demonstrable evidence of superiority of the candidate rejected over the candidate actually hired. Second, to go before such a panel risks public confirmation of the opposite by leading scholars in one's field. Finally, the mere fact that such a program is based on professional criteria rather than nebulous presumptions must have an inhibiting effect on claims without substance.

Remedies for demonstrable discrimination must hit those responsible, not be diffused over a sprawling entity such as a large research university. A history department which discriminates against minorities or women is unlikely to be deterred by the medical school's

[152] Lester, *Antibias Regulation*, pp. 103–107.

[153] Pottinger, "The Drive Toward Equality," p. 28. The same characterization was repeated by Mr. Pottinger at a conference of the Federal Bar Association in September 1974.

possible loss of a Government contract. But there is nothing to prevent the Government from levying a stiff fine on the specific department or other academic unit that made a discriminatory hiring decision—and taking that fine out of that department's or unit's budget for salary and research, without interruption of contracts and the often vital work being produced elsewhere in the university. Indeed, such a fine is a more credible threat, for the Government and the public would often lose heavily if some university contracts were cancelled. Contract cancellation is like a nuclear weapon that is too powerful to use in any but the most extreme cases and so loses much of its apparent effectiveness. Fines are a more conventional deterrent and can be invoked whenever the occasion calls for them.

Between the original concept of affirmative action and the goals and timetables actually imposed lies an ill-conceived mixture of unsupported assumptions and burdensome requirements which remain ineffective because of their indiscriminate nature--their failure to distinguish discriminators from nondiscriminators, or to give anyone an incentive to change from one of these categories to the other. Inescapable burdens do not cause change but only bitterness. That bitterness not only has been directed against those administering affirmative action programs, but has inevitably affected the perception and reception of minorities and women in the academic world—and beyond.

CHAIRMAN FLEMMING. Next, I wish to recognize Dr. George Roche, president of Hillsdale College in Michigan, who has provided all of us with a manuscript dealing with some of the issues in this area. We would be happy to have you proceed, Dr. Roche, in any way you desire in either summarizing or presenting the manuscript.

[At the request of Dr. Roche, what follows is his prepared testimony rather than the transcript taken during the consultation.]

PRESENTATION OF GEORGE ROCHE

One of the goals which most Americans have shared, one of the cornerstones of the American self-assumption, has been that each person should be judged as an individual on the basis of his own merits. Thus, at first glance a program such as affirmative action is potentially attractive to many people, since it promises "action" in eliminating discrimination. Most Americans agree that discrimination is wrong when it treats people as members of a group rather than as individuals. However, the questions which need to be raised concerning affirmative action are: Who is discriminating? And who is suffering in that discrimination?

In an effort to answer these questions, we might profitably examine the definition of affirmative action provided by the program's most eloquent spokesman, former head of OCR, Mr. J. Stanley Pottinger:

> The concept of affirmative action requires more than mere neutrality on race and sex. It requires the university to determine whether it has failed to recruit, employ, and promote women and minorities commensurate with their availability, even if this failure cannot be traced to specific acts of discrimination by university officials. Where women and minorities are not represented on a university's rolls, despite their availability (that is, where they are "underutilized"), the university has an obligation to initiate affirmative efforts to recruit and hire them. The premise of this obligation is that systemic forms of exclusion, inattention, and discrimination cannot be remedied in any meaningful way, in any reasonable length of time, simply by ensuring a future benign neutrality with regard to race and sex. This would perpetuate indefinitely the grossest inequities of past discrimination. Thus there must be some form of positive action, along with a schedule for how such actions are to take place, and an honest appraisal of what the plan is likely to yield—an appraisal that the regulations call a "goal."

Publications of the OCR go on to describe that "goal" and the required method for its achievement: ". . .the guidelines explicitly require that goals and timetables be established to eliminate hiring, firing, promotion, recruiting, pay, and fringe benefit discrimination."

The Office for Civil Rights is quick to insist that "goals" are not "quotas." Mr. Pottinger has repeatedly announced that while he favors "goals," he opposes "quotas" which are "rigid" and "arbitrary."

Mr. Pottinger, who served as the architect for much of affirmative action before his promotion to the rank of Assistant Attorney General for Civil Rights, makes a valid point when he suggests that quotas as such are not required by OCR policy. But it is disingenuous to leave the matter there. It may be that a given policy will result in a quota system without its being called a quota system. This is precisely what has happened in affirmative action programming.

Certainly, the college and university administrators faced with affirmative action have been badly confused in the process. "Goals" and "guidelines" have proven to be nothing more than confusing synonyms for numerical quotas. The college or university faced with proving its innocence by showing "good faith" has discovered that satisfying the bureaucratic task force is a supremely difficult undertaking. Those schools attempting to comply with affirmative action programming find themselves trapped in a mass of paperwork, a labyrinth of guidelines, and a conflicting collection of definitions of "good faith," "equality," "minorities," "goals," and "quotas." Endless amounts of ink have been expended on the distinction between a goal combined with a timetable, and a quota. But the distinction remains exclusively semantic.

There is little practical difference between saying: (1) "You must aim at a quota of 20 percent Lithuanians on your staff within the next 3 years," and saying (2) "You must set as your numerical goal

recruitment of 20 percent Lithuanians within the next 3 years." It seems clear that the Federal bureaucracy has every intention of enforcing quotas, and no amount of semantic confusion should be allowed to obscure the fact.

At the heart of this matter lies a fundamental question concerning group rights versus individual rights. The HEW directives which now attempt enforcement of group-proportional rights are pushing toward a major change in this nation's traditional conception of equality and opportunity. Affirmative action, which evolved from an attempt to end discriminatory practices, has now been elevated to the level of an ideology in its own right. The means has become the end. The bureaucracy which pressed affirmative action upon the academic community does so in the apparent assurance that discrimination is the means to achieve true equality. Individual merit is to be set aside in favor of a new, collective goal for the social order.

Reverse discrimination has been the direct and inevitable result. A quota, goal, guideline, or whatever, which enforces hiring preferences according to sex or race can do so only by denying otherwise qualified candidates proper consideration for the same position.

In the past several years increasing numbers of announcements for job opportunities within the academic community have appeared in professional journals and other academic outlets, making specific reference to race, sex, or ethnic background of the prospective applicant, usually in such a way as to suggest that such applicants will receive preferential treatment. The pressures for such preferential hiring are now an accepted fact in the American academic community.

Samuel H. Solomon, special assistant to the Office for Civil Rights, has already investigated a number of cases and has discovered that a number of America's colleges and universities are engaging in reverse discrimination favoring women and minority candidates for faculty and staff jobs over equally qualified or better qualified white males. Solomon himself has commented, "I've been out on the campus trail in recent weeks and I am getting the impression that most of the institutions are engaging in some form of discrimination against white males." De facto discrimination is now commonplace:

> "Dear Sir: The Department of Economics at Chico State is now just entering the job market actively to recruit economists for the next academic year. . . .Chico State College is also an affirmative action institution with respect to both American minority groups and women. Our doctoral requirements for faculty will be waived for candidates who qualify under the affirmative action criteria."
>
> "Dear Colleague: Claremont Men's College has a vacancy in its. . .department as a result of retirement. We desire to appoint a black or Chicano, preferably female. . . ."
>
> "Dear. . .: We are looking for females. . ., and members of minority groups. As you know, Northwestern along with a lot of other

universities is under some pressure. . .to hire women, Chicanos, etc."

"Your prompt response to my letter of May 12 with four candidates, all of whom seem qualified for our vacancy, is greatly appreciated. Since there is no indication that any of them belong to one of the minority groups listed, I will be unable to contact them. . . ."

Only a few years ago such practices would have been denounced as clearly discriminatory, yet today they have become accepted in academic circles.

Affirmative action has now entered into university officials' decisions in determining who may be hired, promoted, given a raise, or admitted to a given school.

Educators who feel threatened in the self-determination and internal control of their departments and schools perhaps should also consider the implications which lie behind that threat. When a bureaucrat can threaten withholding virtually millions of dollars in funds from Columbia University, not because Columbia has been found guilty of specific acts of discrimination but because Columbia, after a half-dozen attempts and the expenditure of tens of thousands of dollars in computer studies, has failed to come up with an affirmative action plan satisfactory to the bureaucracy, the results should be obvious to all: Federal control of higher education now threatens to produce severe damage to those independent values which have meant so much for the preservation of our institutions of higher learning and the maintenance of an open society.

Several forms of damage have resulted. In the first place, quality and quotas simply do not go together. In the assault on academic quality which necessarily accompanies the imposition of minority quotas, the Jewish community has had most to lose because of its high concentration of students and professors in higher education. Jews make up some 3 percent of the general population but a far higher percentage of the academy, including many of its most highly qualified members. Fortunately, something of the Jewish sense of humor has been retained in the face of this threat. Recently a spokesman for the Jewish Defense League commented with tongue in cheek:

> Jews come from athletically deprived backgrounds. Irving is kept off the sandlot by too much homework and too many music lessons. He is now 25 and still can't play ball, but "he has the desire to learn." Therefore, the Jewish Defense League is demanding that New York City, which has a 24 percent Jewish population, fill the city's ball teams with 24 percent Jews.

When we consider what this would do to baseball in New York, our reaction is a chuckle. When we consider what a similar approach in admissions and faculty hiring is doing to American higher education, the matter is a good deal less entertaining.

Meanwhile, what effect does affirmative action have upon the minorities we are trying to help? Here the story is saddest of all.

One of the casualties of affirmative action has been the black college and university. Competition has become so intense for qualified black professors that the black schools are losing their most qualified faculty members to those large, prosperous, predominantly white institutions that can afford to pay substantially higher salaries.

Meanwhile, qualified minority members are also penalized by affirmative action. What quotas and special privileges are saying all too clearly is that the minority member just doesn't have what it takes and as the result must be given what he is unqualified to earn. Even the minority member who earns his competence will surely be undermined as the result. The suspicion will be present in his mind and everyone else's that his success may be due to special privilege, not talent and hard work. No one resents this aspect of affirmative action more bitterly than the qualified minority member himself.

The unqualified minority member is also cheated in the education which affirmative action promises. In the early 1960s a great drive was under way to bring minority students to predominantly white schools. Between 1964 and 1970, the number of blacks on previously white campuses jumped 173 percent, from 114,000 to 310,000. The promise held out to a generation of young blacks was a lifetime of material success within "the system," a promise which higher education could not hope to deliver, especially since many of those minority students attracted to the campus were unprepared for the life and work which was thrust upon them.

Just as many of these students are ill-prepared to participate in higher education, so are many of their professors ill-prepared to offer a quality experience to their students. Affirmative action has greatly aggravated this tendency. The attempt to achieve a statistically-adequate representation of women and ethnic groups on college faculties has tended to produce a rush to discover sufficient numbers of well-qualified professors with minority credentials. In actual practice, the numbers demanded of such minority types far exceed the qualified people available. Thus a strange new word has entered the affirmative action dialogue. Today we talk about the appointment of persons who are not qualified, but who are "qualifiable." In point of fact, the guidelines state: "Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent."

Has merit come to mean only equality on the lowest level of performance? Not only does this do an injustice to the institution and the students coming in contact with faculty members unqualified to hold their position, but also it excludes from consideration large numbers of an entire generation of young scholars, quite well-qualified to hold a position, yet often rendered ineligible by virtue of their

nonmembership in an HEW-approved minority group. Unfair discrimination and the lowering of standards go far beyond reverse discrimination. Today even well-qualified blacks are passed over for consideration—because they are not from the ghetto. The search is not merely for blacks, but for "authentic ghetto types."

Black professors and black students alike have been downgraded. The first-rank performers have suffered this downgrading because whatever accomplishment they attain is often assumed to be the result of special privilege. Meanwhile, unqualified professors and students from various ethnic groups have been cheated into assuming that they were taking their place in a true educational framework, when, in fact, all the standards which gave the framework any meaning have been undercut. As one Cornell professor bluntly put it: "I give them all *A's* and *B's* and to hell with them." Surely this is not the "equality" which we desire for higher education.

The situation cries out to recruit and educate young people, black or white, on the basis of their individual ability. Yet this is exactly what affirmative action and the patronizing zealotry lying behind it will not permit.

When we discuss the question of discrimination and affirmative action programming, we should remember that the single largest category of all the "minorities" under discussion is women. Most of the problems which apply to other affirmative action programs apply with special force to women.

We also should remember that valid complaints do exist. There can be no question that women do not always receive equal treatment. Top starting salaries for men and women of equal qualification in the same profession are usually not equal. Employment opportunities are frequently not equal even in areas where little or no difference exists between men and women in their capacity to do the job.

The academic community is one of those areas. There are evidences that women, for whatever reason, have usually been less valued members of the academic community than their male counterparts. Women are still paid less as full-time college and university faculty members. Women comprise some 22 percent of faculty and receive salaries on the average approximately $2,500 less than men. Undoubtedly there have been in the past, and still are at present, instances in which women of equal or superior qualification did not have an opportunity to equal pay for the same work or for a particular promotion, which went instead to a man of perhaps inferior qualification. There are famous universities which have never chosen a woman as chairman of a department. On many campuses women teachers tend to be engaged to handle overload problems in undergraduate survey courses. Yes, there are reasons for valid complaint concerning unequal treatment.

Throughout society today, however, many positions formerly reserved for men are now attracting a growing number of women. Positions ranging from police officer to bank manager to truck driver are now more likely to be filled with women. Though only about 18 percent of managerial positions are currently occupied by women, the figure continues to rise, and each year more coeds are being interviewed for jobs with management potential. Even the unions are faced with growing pressure for providing women a larger role, not only for promotion in industrial plants but also for a larger role in union leadership.

Similarly, women are taking a greater interest in joining college faculties. But it should be remembered, even by the most insistent partisan of equal rights for women, that most college and university teaching situations involve certain factors, common to the lives of many if not most women, that have a bearing on salaries and promotion. As a group, women have been less likely to complete terminal degrees, thus reducing their value in academic positions. As a group, women are far more likely to be affected in their careers by marriage and children, thus in some cases ending their desire for further education or for a continuation of their teaching position. Thus, the tenure and qualification of many women are frequently less than those of their male counterparts. For those women who indeed have equal or superior credentials, equality of opportunity for various positions should certainly be available to them, but it would be incorrect to assume that the most pressing concern in the lives of all the women in the country is a desire to be a college professor or take a Ph.D.

As in the case of minority quotas, serious confusions and potential injustices are involved in academic quotas for women. How does a school determine that women are "underutilized"? The current recommended bureaucratic method is to measure the percentage of degrees granted nationally to women in a particular discipline against the percentage of total teaching positions held by women in that same discipline on a particular campus. Never mind whether those women available nationally wish to teach at your school; never mind whether you have positions available to offer those women; above all, never mind whether or not those women candidates interviewed for a job are the best qualified for the particular job in the opinion of faculty and administration. No, the only deciding factor is to be the quota.

It seems clear that in the case of women as in the case of minorities, individual achievement is to be replaced with affirmative action quotas and group pressures. Unfortunately, there has been a frenzied rush to compliance which offers little or no leadership on behalf of the concept of individual measurement, for men or women.

In the midst of this sexist hysteria, the same reverse discrimination exists in quotas for women as in quotas for minorities. On campus after

campus, the push to achieve hiring quotas based on sex has introduced a marked distortion and injustice to the hiring process. As one dean described the situation, "If you're a woman and preferably black, you can get any kind of job you want." What this does for the job prospects of others, including minorities, should be self-evident.

Two kinds of injustices are the result of this forced distortion in the hiring of women. Just as a qualified racial minority member is undercut by compulsory hiring, so too does the qualified woman suffer when hiring and promotion are no longer granted on the basis of individual merit. In her eyes and in the eyes of her colleagues, the doubt is raised as to whether she deserved the position she was granted, or whether it was given simply to comply with HEW rules as a cosmetic gesture.

The second problem is that of maintaining academic standards in the face of impatient pressures to utilize more women in the academy. When only 13 percent of the doctorates in America are awarded to women, and when feminists on the campus are advocating that women faculty members should be on a one-to-one basis with men, where are the qualified female faculty to be recruited to fill the positions?

Although we hear a great deal about discrimination against women, and though such discrimination undoubtedly exists in many quarters, it is interesting that only 8 percent of those women polled by the authors of a recent study, *Sex Discrimination against the American Working Woman,* thought themselves to be victims of discrimination. Perhaps the other 92 percent have recognized that steady progress has been made in according an even break to those women who choose to work. Certainly, the professional position and pay of women in the academic world had already been progressing for years in both relative and absolute terms. Perhaps the 92 percent are aware of the large number of women who have been able to distinguish themselves in academic life without special enabling legislation on their behalf. Perhaps the 92 percent also resist the tendency to homogenize their skills, energies, and personalities into an egalitarian group project.

Finally, the 92 percent may simply be exercising their prerogative to be women.

Whatever the case, the situation cries out for women to be judged on their own merits, as individuals, in whatever circumstance they choose. A reverse discrimination in their behalf is as damaging to those women who are qualified as it is to their male and ethnic minority counterparts who are excluded on their behalf.

There is serious confusion at the heart of the egalitarian ideal. The thrust of affirmative action in all its forms is toward the homogenized society in which all are absolutely equal, and yet the means of attainment is to be through special-group identity. We are all to be made identical by treating various interest groups in nonidentical ways, giving some privilege and discriminating against others.

Even if the egalitarian society were possible to achieve, the effort to attain it by unequal treatment of individuals is not likely to succeed; such methods would surely become the means which destroyed the end. We in America are just beginning to face the nature of this powerful dilemma.

It has been the American insistence upon an equality measured in freedom, independence, and opportunity that has characterized our system. It is the accompanying inequality of individual talents, given full play by the legal guarantee of equal opportunity, which has led to progress in religion, intellectual affairs, the production of material wealth, and the pursuit of individual meaning in life. The social advances which we take for granted have their origin in allowing the individual the opportunity to give full play to his creative resources. It is precisely that aspect of American life which is now so heavily under attack. The assault upon the merit principle today is present not only in higher education, but throughout American society as a whole. The real danger of the social engineering now under way is that the drive toward mediocrity reflected in affirmative action programming has behind it not only the full weight of the United States Government, but the unthinking support of most molders of public opinion.

Lowered standards in admissions and faculty hiring, induced by HEW standards and such bizarre notions as the "qualifiable" candidate, will inevitably have an effect throughout all segments of higher education. It should be obvious that the hiring of a faculty member on any other basis than the particular merit of that individual faculty member must in the long run be prejudicial to the quality of the institutional faculty so affected. The responsibility of every faculty and administration in this country is to find the most qualified person available for a particular post, regardless of race, sex, religion, or national origin. Any other basis for selection is not only discriminatory, but must necessarily be a downward step in the quality of the institution.

The same situations apply for admissions policies in academic institutions. Those institutions which have experimented with lowering their admissions standards to achieve racial balance have then found that the students admitted under the lower standards can only be retained in school if the institution is willing to lower its classroom standards as well. As in the case of discriminatory hiring, discriminatory admissions practices work directly contrary to the ideal of quality education.

Perhaps one of the most saddening aspects of the entire affair is the special damage which affirmative action inflicts upon the very people for whose benefit the program presumably operates. The hiring of professors or the admission of students on any other basis than ability works a particular hardship on the "favored" groups. The qualified, achieving students and teachers can never be sure of where they stand.

How can one build an academic standing when neither he nor his colleagues will ever know for sure whether he is there because of ability or because he was part of some racial or sexual quota? The unqualified student or professor fares even worse. Such a person can be retained only by lowering standards and thus cheating those involved of the education they have been promised.

Despite our problems, one of the central facts of American history has been the achievement of a high degree of individual equality for most citizens. Perhaps the Nation somehow sensed that human beings achieve their fulfillment in what they become. Certainly we are most fully ourselves as we aspire to further development, and enjoy the freedom to pursue it. It is in connection with our aspiration that we seek equality for each person. Surely race or sex is an inadequate basis for such equality. We do not aspire to be black, white, or yellow, male or female. These categories are facts of existence, but the achievement which we seek in life must lie elsewhere, and it is elsewhere that the definition of true equality must also be located.

What we all want, and what some members of society presently lack, is acceptance as an individual by others. It is that acceptance which consitutes genuine equality. Each of us wants to be a person in his own right. Such acceptance can hardly be produced by governmental compulsion. Compulsion smothers any creative response to a problem.

Quotas undercut acceptance for the individual. No matter how many legal guarantees enforce the quota, the primary effect is a stoppage of the acceptance and the opportunities for individual development which we seek. If a person lacks qualification for a position, it is a disservice to that person and to society as a whole to enforce a quota and compel legal acceptance. Quotas limit rather than enhance opportunity; they degrade rather than dignify. And as one pastor of a Harlem church put it, speaking for all quota-entrapped groups, "If we are going to be judged without discrimination, then we will also be judged without pity." The only equality with real meaning is that based upon an absence of prejudgment. The quota is itself a prejudgment, institutionalized with the force of law, standing as a permanent obstacle to true equality.

Perhaps the route toward alleviation of our present discontents lies through a restatement and redefinition of the equality we seek. A vast majority of us want genuine equality of opportunity for all citizens. Discrimination on the grounds of race, sex, religion, or any other group-oriented basis is simply unacceptable. But the course we now pursue is calculated to enforce a peculiarly American version of apartheid, an apartheid which not only sets race apart, but adds sex as another category of public regulation.

By every standard of simple equity, by the standards of the American dream at its best, in the interest of all individuals, especially in the interest of the "disadvantaged," and finally in the interest of society as a

whole, we must understand that the egalitarian dream now pursued by affirmative action programming on the campuses of America's colleges and universities is undercutting the very structure of the open society. The commendable quest for equality of opportunity must not be confused with the shoddy, politicized quotas of affirmative action.

CHAIRMAN FLEMMING. Thank you very much.

Now, I would like to give the members of the panel the opportunity to react to these two papers as well as the paper by Dr. Sandler. First, I will recognize Ms. Gertrude Ezorsky, professor of philosophy at Brooklyn College, City University of New York.

RESPONSE OF GERTRUDE EZORSKY

DR. EZORSKY. A reference was made this morning by Professor Borgatta of City University of New York reporting discrimination, specifically the report of the chancellor's advisory committe. That report concluded there was sex discrimination at the university, and I hereby request that the report be included in the record of these proceedings.

CHAIRMAN FLEMMING. Without objection, that will be secured and placed on file at the Commission's offices.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

DR. EZORSKY. I did not receive these papers until a few days before the conference. Hence, I apologize in advance. I shall focus primarily on some statements made by Professor Sowell. I shall not discuss what qualifications ought to be. I shall say, however, that the qualification standards presumably followed by universities were not employed impartially with respect to women.

Professor Sowell writes: "On the basic policy issue of employer discrimination, such evidence as there is lends no support to this as an explanation of male-female career differences. . . .Marriage is a dominant-and-negative influence on academic women's careers."

His rationale, like Professor Richard Lester's, whose book *AntiBias Regulation of Universities* he quotes a number of times, is initially plausible. It runs something like this: Academic women have time-consuming domestic responsibilities. This causes married women to inevitably become less qualified. Hence, it is the home, not the work place—that is, the university—which is responsible for the inferior position of academic women. But universities cannot be faulted for failing to hire people who are less qualified for reasons over which universities have no control.

This thesis is initially plausible. There is, however, a countertendency, also plausible. The countertendency was baptized by L. R. Harmon as "higher hurdles." It runs something like this: All social pressures, including domestic ones, eliminate those women from the competition who are less capable. Those who overcame these hurdles and remained

in the competition were as individuals better in quality, although as a group, smaller in quantity.

For example, as Professor Sowell notes, female academics will have the doctorate less frequently than men, but those women who did become Ph.D.s overcame enormous pressures to get that doctorate. Hence, they might tend as a group to be better than their male counterparts. Note that this thesis is not that women *per se* tend to be superior to men. It states only that a group which had to overcome obstacles would tend to be better, as a group, than their competitors who faced no such obstacles. Thus Jessie Bernard, author of *Academic Women,* noted, in comparing male and female students who planned graduate study, that there were proportionately more women at the top and more men at the bottom of the group (p. 80). Hence, there are at least two relevant tendencies working against each other with respect to women's qualifications. One, social and domestic pressures against women developing the relevant qualifications. Two, the tendency of those who overcame these pressures to be superior as a group to men. Now, if Professor Sowell is right, the first is the strongest, not the second. What is his evidence?

Withdrawal from Work Force

He writes, "25 percent of women Ph.D.s" engage in "complete withdrawal from the labor force."

His claim is both irrelevant and false. It is irrelevant because, if true, it would not show that the available smaller supply of women is not qualitatively better. But let's look at the claim and see if it's true. Where is his evidence that 25 percent of women Ph.D.s completely leave the work force? He gives us a source: David Brown, *The Mobile Professors,* page 178.

David Brown writes, "One-fourth of all women Ph.D.s leave the labor force."

But, "leave" is ambiguous. Do they leave permanently or temporarily? Brown does not say. Moreover Brown himself conducted no investigation. He sends us to another source not mentioned by Professor Sowell: Jessie Bernard's *Academic Women.* What did Bernard actually say? "As many as one-fourth of those (women) who achieve the Ph.D. may drop out either *permanently* or *temporarily* to rear families." (p. 66, emphasis added.)

Note that what Bernard states as a *possibility* of *permanent or temporary* withdrawal is transformed by Professor Sowell's reporting into an actuality of permanent withdrawal.

Why did Bernard put this forth only as a possibility?

Her evidence was a study of women biologists and chemists 10 to 15 years after receiving the Ph.D. *(Academic Women,* p. 287). The study showed that 21 to 24 percent of these women were not listed in "American Men of Science"! That is the evidence for Professor

Sowell's conclusion that 25 percent of all women Ph.D.s completely withdraw from the labor force.

As it happens there is good evidence for the number of women Ph.D.s who withdraw from the labor force: Helen Astin's *The Woman Doctorate in America,* a study of all women doctorates who received degrees in 1957 and 1958. What proportion of women Ph.D.s completely withdrew from the labor force? 25? 20? 15? 10? 5? No. Three percent of women Ph.D.s actually withdrew completely from the labor force. Quite a comedown from Sowell's figure of 25 percent.

Career Interruption

Sowell claims that "24 percent [of women Ph.D.s] had interrupted their careers prior to receiving the degree (compared to 2 percent of men) and 'another 20 percent' afterwards (compared to 1 percent of the men)."

This claim is relevant to establishing the qualifications of women vis-a-vis male Ph.D.s. It is plausible that longer career interruption would have an adverse effect on the academic qualifications of the individual. But Sowell's claim is in fact quite misleading. His source is Barbara Reagan's "Two Supply Curves for Economists?" *(American Economic Review,* May 1975, pp. 102 and 103). But Sowell fails to inform us that Reagan's study concerned not women Ph.D.s in general but only women Ph.D.s *in economics.* Moreover Sowell ignores two crucial items.

First, Helen Astin's study of all women who received the Ph.D. in 1957 and 1958 showed that the median career interruption is only 14 months. Second, the ACE Research Report, *Teaching Faculty in Academe,* vol. 8, no. 2, 1973, p. 27, reports the following: When academics were asked whether they had interrupted their careers for more than 1 year *for family or military reasons,* 25.0 percent of all male faculty, but only 19.7 percent of all female faculty answered in the affirmative.

No doubt career interruption for military service affects male, not female faculty, and I suggest that interruption might impair qualifications more severely than one caused by family reasons. A woman, pregnant or caring for a small child, is usually staying home, near a library or her laboratory. She might plausibly continue research in her own field, while the man in military service, in the South Pacific or Europe during World War II, has no such opportunity. Hence, it might turn out that male, not female, qualifications have suffered more from interruption of career.

Overrepresentation

Sowell claims that women are overrepresented in the academic labor force, hence not discriminated against. He writes: "The classic study *Academic Women* by Jessie Bernard described women as 'overrepre-

sented in college teaching'; this was based on the fact that women were only 10 percent of the Ph.D.s but more than 20 percent of college and university faculties."

Sowell's reporting is quite misleading: Bernard did not assert that women are "overrepresented in college teaching." She said that "if the qualified population is limited to those with the doctor's degree, women were overrepresented. . . ." (p. 52) But, as Bernard knows, a great many instructors in colleges do not have Ph.D.s. Hence she explains: "What is really needed is the proportion of those in the labor force with five or more years of college education who are women." Using that proportion as a base, it turns out that women have approximately equivalent representation.

However, such equivalence does not disprove the sex discrimination claim against universities. No one is claiming that women aren't hired at all by academic institutions. The sex discrimination charge is, rather, that the job, pay, and rank typically given her falls below her qualifications. Consider one standard of qualification used by universities: publication.

Publication

Professor Sowell writes: "Female academics publish only half as many articles and books per person as do male academics, and females are specially underrepresented among frequent publishers." His source is David Brown, *The Mobile Professors.* But Sowell fails to inform us of Brown's analysis of this publication data. (p. 78–79). Brown calculated the proportion of women who would be hired if hiring were sex-blind—i.e., impartial—with respect to publication. Brown concluded:

> Discrimination exists. The top decile [of institutions] should have hired more women. Similar figures are calculated for all echelons. They indicate that the top 60 per cent of all institutions of higher learning do discriminate against women by hiring too few of them, even after accounting for their differential in productivity.

But Brown insists that this discrimination is self-imposed: Women prefer, not the top research-oriented university, but the small college which emphasizes teaching. Sowell makes the same claim: "Women prefer teaching over research more so than academic men." How does Sowell know this? "They [women] work in low-paying teaching institutions more so than the top research universities with high salaries."

But, by Sowell's reasoning, coal miners prefer to work in coal mines because that is where they, in fact, do work. The relevant question is, of course, what alternative to such jobs have they been offered? How many women have turned down an offer from a top university to take a small college teaching position?

Sowell also informs us that women spend more time in teaching than in research than do men. But does this prove their preference for teaching over research? Of course not. Women are hired primarily by institutions where they are expected to spend much more time in teaching and their research time is extremely limited.

Sowell also claims that attitude surveys show academic women prefer teaching to research. He cites Bernard, page 151. Bernard did report that some academic women have stated such preferences. But I suggest there is a familiar human tendency to aspire to what one may reasonably hope to get and to refrain from aspiring to be at places where one is not welcome. If major universities don't offer professorships to women who, by their qualifications, deserve them, then, of course, less women will aspire to such positions.

I repeat, if there are women who have turned down professorships at major universities in favor of lower-paying positions in small teaching colleges, their preference for these colleges would be demonstrated. There are practically no such women. If any significant number existed, major universities could surely justify the absence of women from their faculties. They could show HEW civil rights investigators that they offered professorships to women who are equally productive with their male faculty but these women preferred lower-paying jobs at institutions which give them less time for research. Then these universities could justify the overwhelming absence of women from their faculties.

Now, here are some of the statistics which these universities have to justify:

Approximately 1 in 8 Ph.D.s is a woman, but at major universities 1 in 50 full professors is a woman. Women are granted 1 in 6 sociology Ph.D.s, but only 1 in 100 sociology professorships in top graduate schools.

Women were awarded 10 percent of Harvard's arts and sciences Ph.D.s in 1960, and 19 percent in 1969. But Harvard's 1969–70 senior arts and sciences faculty (except for one woman's chair) was composed as follows: men, 483; women, 0.

In 1968, Columbia awarded women 67 percent of its Ph.D.s in French, 44 percent in anthropology, 36 percent in psychology, and 17 percent in philosophy. But no woman was included on these Ph.D.-granting faculties.

In 1968, major institutions awarded the following percentages of Ph.D.s to women in five disciplines. Psychology: 26 percent; zoology: 20 percent; biochemistry: 21 percent; history: 13 percent; philosophy: 11 percent. But Berkeley's 163 faculty positions in these five disciplines (instructor and up) were distributed in 1968–69 as follows: men, 163; women, 0.

I repeat, these incredible statistics could be justified if major universities had made offers to women, equally qualified with their

male faculty, but these women turned them down for small college positions. But no evidence of such offers exists. That is one reason why universities are so anxious to get the HEW people, those whom Professor Sowell calls outsiders, off their backs. How are they going to justify these figures to "outsiders"? And, if outsiders don't come in, universities won't have to justify it to anybody.

Marriage

Finally, let's consider Professor Sowell's major justification for the inferior position of academic women. "Marriage is a dominant-and-negative influence on academic careers." According to Sowell, time-consuming, marital, domestic chores drag down women's qualifications. Since women become less qualified, universities can't be faulted for failing to hire them. Here is some of the evidence Sowell gives for this thesis. "Another study of Ph.D.-holders in the academic world showed that 46 percent of the men had tenure, as did 44 percent of the single women, but less than 30 percent of the married women."

The study described is, in fact, "The Woman Ph.D., A Recent Profile" (R.J. Simon, S.M. Clark, and K. Galway, *Social Problems,* fall 1967), a study of women who received their doctorates between 1958 and 1963. I should like to request that this study be incorporated in the official record of these proceedings.

CHAIRMAN FLEMMING. Without objection. So ordered.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

DR. EZORSKY. Sowell refers us, however, not to the study itself but to Richard Lester's account of it *(AntiBias Regulation of Universities,* p. 41). Lester wrote: "Some studies indicate that marital status is perhaps the most significant factor in explaining differences in salary and promotion rates." Lester does indeed state, as Sowell reports, that among the Ph.D.s (studies by Simon, Clark, and Galway) only 30 percent of the married women, but 44 percent of the single women and 46 percent of the men, had tenure. With respect to rank, men tended toward the top; single women, to an intermediate position; and married women toward the lower levels.

CHAIRMAN FLEMMING. Pardon me. Could I interrupt for just a minute, because Commissioner Saltzman has to leave. And he does have a question that he would like to address to one or more members of the panel. Then I will come right back.

COMMISSIONER SALTZMAN. This is a statement that I fully confess is premature. I do not refer to the immediate testimony, but I make it after a day and a half of this consultation. I am deeply concerned that we are dealing with a tempest in a middle-class teapot.

There are children out there in the city who can't read and write and who may not complete high school, let alone go to college. They don't have the opportunity to grow up in homes that have sufficient food and

have parents that make them feel they are loved and worthwhile and decent human beings. The academic world has done little to address that issue. And now it is arguing about semantics.

There is a problem, you all admit, of discrimination in the university system affecting women and minorities, and the difference, I guess, is basically over mechanics. Were the university community more deeply involved and committed to the whole area of civil rights, I suspect its discriminatory practices against women and minorities would not be so blatantly out of compliance. I am moved to think what would happen if we just threw out the whole business and established just a simple grievance procedure, perhaps, and directed more of those resources—financial and intellectual—and applied them to what is happening in the city and the decline and possible destruction of America, because we are not raising up a generation of young people who have a decent world and a decent society to live in.

DR. EZORSKY. I was discussing the thesis advanced by Professors Sowell and Lester that marriage was a negative influence on academic careers and that universities cannot be faulted if they had put married women in inferior positions.

Professor Sowell cited statistics which he found in Professor Lester's book. These statistics, taken from Simon, Clark, and Galway's study of women receiving their Ph.D.s between 1958 and 1963, showed the following: With respect to achieving promotion and tenure, men tended to rank highest, then single women, and then married women lowest.

But Lester failed to report the comparative productivity of these married women who were at the bottom with respect to tenure and rank, although Simon, Clark, and Galway were quite explicit: In every field married women publish more than unmarried women. . .married women with and without children do better or at least as well as unmarried women. . .married women publish as much or more than men, and unmarried women publish slightly less than men. The differences on the whole are not great. (pp. 230–31)

Notice the very study which shows that married women Ph.D.s were at the bottom with respect to tenure and promotion shows that they were slightly more productive than the single women or the men. Remember, Lester's thesis is that married women, because they are less qualified, are in an inferior academic position. But the very study Lester cites shows that the married women, although slightly more qualified by the publication standard, are given far inferior positions. Lester handles this counterevidence very simply. He just pretends it doesn't exist.

Notice, too, what is meant by "productive" or "having equal or slightly more publications." "Equal or slightly more" means that you have an equal or slightly greater number of articles or books accepted for publication. Allow me to refer to those studies with men and

women students, which showed that in every single field when a work was shown to men students or women students, invariably the same work was rated lower when it was attributed to a woman. (Philip Goldberg, "Are Women Prejudiced Against Women?" *Transaction,* April 1968 and "Training the Woman to Know Her Place. The Power of a Non Conscious Ideology," S.L. and D.J. Bem, *Women's Role in Contemporary Society* 1972). Hence, it is likely that the people who ran the journals accepting these articles might downgrade an article if they knew it was written by a woman. This seems to be generally true. Hence, when a woman looks equally good with respect to her publication record, we might conclude that she is probably much better.

What Lester and Sowell, who simply repeats Lester's crucially incomplete data, offer as a justification of preferential treatment of women-marital status turns out to be something else, a clue to how employer prejudice against women works. First, if an academic woman is married, the university employer ignores the fact that she is equally or more qualified than her male counterpart. Thus, being married is used as an excuse for ignoring a woman's qualifications.

Secondly, university bias contributes to the negative effect of marriage on women's careers. If universities don't treat married women in accordance with their qualifications, then of course some of that 50 percent women Ph.D.s who are married are going to put their husbands' careers first. If a man is more likely to get the desirable job, then the husband's job will be more causally effective in determining where the couple lives. Thus, university bias against married women contributes to any domestic pattern where the married woman puts her husband's career first.

Salary

In discussing salary differentials, Professor Sowell again misinterprets. His argument is circular. He writes: "Even the comprehensive studies by Astin and Bayer make the fatal mistake of holding marital status constant in comparing male-female career differences."

CHAIRMAN FLEMMING. Ms. Ezorsky, I am wondering if you have much more because I am thinking of the other reactors.

DR. EZORSKY. Just 2 more minutes.

Was it crucial for Astin and Bayer not to consider the marital status of the people involved? This is what they found: To award women the same salary as men of "similar rank, background, achievement and work setting" would require a compensatory raise of more than $1,000. Now, suppose the married women among the academics studied were paid less. This means that married women of "similar rank, background, achievement and work setting" are paid less than their male counterparts. This indicates that the universities are biased against married women.

Finally, I suggest that Professor Sowell's paper, like Lester's book, has some value, not because they have falsified the claim of university sex discrimination, but because contrary to their own intentions they have, by emphasizing marital status, suggested one way in which that discrimination works.

Well, I hope somebody will ask me about my own experience because Professor Sowell says he thinks HEW just gives status to people who are despised. I would like to report my own experience in being helped by HEW, and also I would like to say something about the real difference between goals and quotas. CHAIRMAN FLEMMING. As the discussion proceeds, I hope you will feel free to come back into it and deal with those points.

I will now recognize Dr. Goodwin, who is assistant to the vice president of university relations at the University of California at Berkeley.

DR. GOODWIN. I would prefer to pass it to Dr. Todorovich. Since my comments are in support of the previous speaker to a large extent, it would be better to have some variety.

CHAIRMAN FLEMMING. That is a very good suggestion. We would be very happy to follow it.

DR. TODOROVICH. Mr. Chairman, ladies and gentlemen, before I go directly to the matter at hand, to respond to what Dr. Sandler said, let me take just a minute or two because yesterday I was mentioned here by name in conjunction with some proceedings, and I would like to straighten out that point. This is connected with the question of what Order 11246 actually says, and it is also germane because this morning Mr. Peter Holmes implied that Order 11246 actually mandates the position; but this is just simply not so.

The pertinent part of the order reads as follows:

> The contractor, in this case the university, will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin. The contractor will take affirmative action to insure that the applicant is employed and that the employees are treated during employment without regard to race, color, religion, sex, or national origin.

Notice is to be provided by the contractor setting forth the provision of this nondiscrimination clause or advertisements for employees stating that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin. The contracting agency of the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit their report, a statement in writing signed by an authorized officer, agent, on behalf of any labor union so the policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that he will either affirmatively cooperate with the order or that he

consents and agrees that the terms and conditions of employment under the proposed contract shall be in accordance with the purposes or provisions of the order.

I submit that this is all that the Presidential Order 11246 amended says about affirmative action and what it mandates.

Now, yesterday I was told that it is a practice that various agencies do write to a large extent very detailed things about items which may be written concisely in the Presidential order. I just wanted to clarify this at the outset so that you know over what kind of background we are having our discussions here today.

RESPONSE OF MIRO M. TODOROVICH

Mr. Chairman, members of the Commission, ladies and gentlemen:

I want to thank you for the privilege of appearing at this consultation. As I sat yesterday and listened to the presentations and discussions, and as I reread Dr. Sandler's paper last night, I was overcome by an increasingly deep sense of uneasiness and alarm. "This is," I thought to myself, "how Galileo must have felt once." He knew the works of Copernicus, had studied them carefully, consulted all other available sources, and arrived at the firm conclusion, based on facts, that the earth turned on its axis around the sun. And yet, as we know, the official doctrine of the times held otherwise, and its teaching was quite effectively enforced. Those who questioned the officially decreed "truth" were the objects of scorn, ridicule, and even persecution. Without wishing to seem melodramatic, I felt that, like Galileo after his recantation, I should in my own way whisper to you: "And still, it is the earth that moves."

Dr. Sandler's paper and most of yesterday's presentations share a common rhetorical basis which is, I believe, at the heart of all difficulties in this area. It is a rhetoric which assumes not only that critics of the present programs are wrong but that they are in bad faith. The glorious history of the civil rights movement—great cases like *Brown* v. *Board of Education* and *Sweatt* v. *Painter*—are invoked by the partisans of quotas and preferential treatment. Those who oppose racial and gender quotas for hiring are simply equated with those who opposed integration of the public schools. Mr. Taylor said so this morning. Opprobrious epithets accusing critics of intellectual prostitution are hurled at them. Dr. Harris did so yesterday. Opponents of the existing programs are accused of plotting to exclude women and minorities from the university. While a speaker bemoans the lack of "generosity" in the university's response to quota systems, a similar generosity does not begin to be found in the rhetoric of their proponents.

Thus, Dr. Sandler routinely remarks that "some academics have raised the cry of 'Federal interference with academic freedom,' the 'decline of merit on the campus,' and 'reverse discrimination'" because they were *"long accustomed to holding a privileged place in American*

society" (italics mine) "and often convinced that discrimination was not a problem on their campus." Again she writes: "Institutions are upset because they have generally relied on the 'old boy' method of recruiting and hiring." Still again: "The threat of women 'taking over' may be far more anxiety-provoking to men than the threat of minorities." And this morning in discussion, despite her contention that goals are merely a target for "good faith" efforts, Dr. Sandler relapsed into the spirit which I believe is that of the reality of these programs by distinguishing between "good" faculty members, whose departments achieve their goals, and "awful" faculty members, whose departments fail to achieve total success.

It is impressive that throughout this oft-repeated chorus there is no attempt to grasp the thought that what might be bothering us is precisely that the principle of equal opportunity *without regard,* if I may quote Executive Order 11246, to race and sex is gravely threatened by its perversion into the pursuit of proportional representation, with the groups chosen for proportionality selected by the officials of the Departments of Labor and HEW.

Ladies and gentlemen: *Sweatt* v. *Painter* and *Brown* v. *Board of Education* are *our* cases. Sweatt sought equal treatment as a citizen equally protected by law and Constitution with all other citizens. *Brown* decided, if I am not mistaken, that separate facilities were unconstitutional because they could not afford the equal educational opportunities to equally enfranchised citizens. I reject as strenuously as is possible the attempt at rhetorical intimidation which holds that the defense of equal opportunity for individuals without regard to their skin color or gender is either elitist, racist, or sexist. Until that assumption is dropped, serious discussion is supremely difficult, since it would always have to start with the conclusions known in advance.

When guilt by association fails to achieve the requisite effect, the next line of defense for existing programs is the assertion, designed once more to convict defenders of the merit principle *a priori,* that universities have been guilty of massive, systematic discrimination and exclusion of women and minorities. Such assertions became customary long before the recent statistical studies, which could have told us what the facts really are, began to be made. In lieu of convincing statistics, we have for years had anecdotes, and we continue to hear them yesterday and today. Yet it remains unquestioned dogma that, as Dr. Sandler says: "Many persons have noted that discrimination against women on the campus is so widespread that it is a national scandal." Also: "Women and minorities are typically outside the old boy [hiring network]." Again:

> Given the fact that there has been discrimination in the past, and that as a result of that discrimination the number and percentage of women and minorities on the faculty is often substantially below what would be expected in terms of available qualified women and

> minorities, affirmative efforts to recruit such persons and to eliminate discriminatory policies and practices would result in an increase of women and minorities in the faculty over a period of time.

And: "Preference for white males has always existed in academia."

What, however, is the reality now emerging into light? Dr. Sowell's excellent paper, the statistics of the Carnegie Council report, and other recent studies show that the charge of general systemic exclusion of available women and minorities is now and was before the quotas were imposed, a canard, a dead duck. That this is so the recent positions of the advocates of goals attest. The Labor-HEW "format," echoed yesterday by Mr. Travis, presents the Labor Department's view that "availability" of women and minorities is very low. That sentence tacitly concedes the central point. Had the alleged systematic discrimination existed, availability would have been, should have been, and was again and again predicted to be very high. Dr. Glickstein's attack on the use of the doctorate as a qualification in hiring is a sign that he too recognizes the dilemma. So too is his remarkable suggestion that affirmative action officers in universities enter into a cutthroat competition with affirmative action officers in industry, law firms, and hospitals for the sake of improving the university's affirmative action image. The prospect of the Committee for Affirmative Action-Universities locked in mortal combat with some future Committee for Affirmative Action-Hospitals for the limited and at present scarcely increasing percentage of qualified minority applicants is one I would not expect this Commission greatly to look forward to.

When we relieve ourselves of the unnecessary burden of false assumptions, what does the situation really look like? The goals and timetables approach has been a miserable failure. Dr. Sheila Johnson's brilliant article in *The New York Times Magazine* of May 11, 1975, entitled "It's Action, But Is It Affirmative?" succinctly conveyed the utter failure of a plan in which, for once, availability figures were taken seriously so that over the next 30 years, 31 departments are required to hire 95.71 women and 4.16 blacks (no American Indians or Chicanos) to meet the precise numerical goals. The result of this result-oriented program was thus as trivial as the manipulative principle behind it was wrongful. It is no wonder that the Carnegie Council report describes these programs as on the brink of self-destruction. Of course, we know the argument that the only answer to failure is to plunge ahead with ever more strenuous doses of what has failed. I seem to recall similar reasoning used to justify persistence in a recent foreign policy quagmire this country found itself in.

Still, a detached observer might come to the conclusion that we are once more engaged on the domestic front in a futile struggle over symbols whose substantive effect will not and cannot be the one we all want to achieve, but its very opposite. The use of racial and gender

criteria in hiring is not equal opportunity for individuals. The pretense that it is merely creates group discord and an increasing cynicism about the motives of those who preach that it is. But, despite the enormous cost in public consent to equal opportunity programs, quota plans do not, as we by now all know, achieve their intended results. However, the few American black Ph.D.s are shuffled about, and the goal of integrating all levels of American society is not brought nearer to attainment. Yet there are those—blacks, females, Orientals, Jews, and even WASP males—who do suffer, not from underutilization but from old-fashioned, direct, personal, invidious discrimination. What does the present program do for them? Remember the Executive order. Its goal is affirmative action to see that all are treated without regard to race or sex. How do we stand here?

We all know the answer. HEW will no longer take individual cases. EEOC has practically given up struggling with its burden of cases. Those groups which protested HEW's decision to cease hearing individual cases have not only my sympathy, but on this issue, my full support. Yet, how could the result have been otherwise, given that all the effort of enforcement officials has been diverted from fighting discrimination to seeking to impose a statistically nonsensical symmetry of proportion by race and sex in university life. It is not true, as Dr. Sandler implies, that we, in opposing quotas, claim that discrimination does not exist. Indeed it does (as do crime and intellectual sophistry). That is why we want to fight it when and where it occurs and to whomever it occurs without regard to whether they belong to a group temporarily favored by Federal bureaucrats. Adjudication is the issue. Nondiscrimination is the target. Proportionality is a vicious substitute for fair treatment of individuals.

We have proposed a number of steps to enable those complaining of unfair treatment to find swift and competent redress. These steps involve using the resources of the academic community to achieve this laudable end. Yet I never fail to be impressed with the mixture of arrogance and neglect whereby it is first assumed that the universities are too corrupt to police themselves and then concluded that, therefore, the purehearted officials must save us all from ourselves, and then, finally, the actual cases are left to molder in someone's file who presumably has bigger game to hunt. That is what comes of putting symbols before people.

Of course, symbolism is important. It matters, for instance, whether people in this country know that their right to equal treatment under the law is secure, or whether they must belong to the right groups to get it. On this point, the supporters of existing programs differ. Dr. Sandler feels equal treatment is not at stake here. Goals are nondiscriminatory and good; quotas are preferential, illegal, and evil. Any confusion is regrettable but easily clarified. I will not reopen an argument we must all be bored with, except to note that neither former

Representative Edith Green, whose investigations Dr. Sandler mentions with approval, nor Dr. Edward Levi, who as Attorney General of the United States and former president of the University of Chicago ought to know, accept this ingenuous (and ingenious) view. When the Government asks you to fulfill a racial or gender goal, it seems to me odd to deny that this has the effect of seeing that it gets done at the expense of other, educational considerations.

But there are others, such as Dr. Harris, Dr. Glickstein, and Dr. Pollock, who frankly advocate preferential treatment: That is, the denial of equal opportunity on the basis of merit to individuals. We heard yesterday that we should not be shocked at this, that it is merely a "matter of policy." By this, I take it, they intend to distinguish between matters of fundamental principle on which we should all agree, and matters (like tariffs, for example) of choice, of prudent calculation. Equal opportunity is thus a matter of policy.

Well, let us treat it as one for a moment. Matters of policy are decided, not unnaturally, politically. If we are to give blacks *x* points on a merit exam as historical compensation, the problem arises how many do we give women, as a *matter of policy?* How many for Orientals? Puerto Ricans? Do Cubans count? Or only if they are poor? As for that, what about white poor? Those in West Virginia? Or even those in South Boston? Indeed, this morning we heard one of the speakers intimate satisfaction at the prospect of quotas for Jewish academics, since the available pool was so large.

This is, of course, not a parade of imaginary horribles. Law cases already exist where women have sued universities which favor minorities on entrance, on the grounds that they deserve a break too.

Of course, the scale of relevant compensation will not be worked out in heaven, in a department of sociology, or on HEW computers, but politically. Race is set against race in the competition for inclusion on the favored-groups list, which may increase apace with that of vanishing species. And we will all lose sight, as I fear many here may already have lost sight, of the fact that equal treatment of individuals is, as Dr. Roche has emphasized, fundamental to a free and decent society.

Yesterday Dr. Glickstein chastised me for speaking of the arrogance of bureaucrats in devising these regulations. He told us that present practice has many precedents. Dr. Glickstein is a lawyer and knows whereof he speaks. Perhaps such practice is not unusual. But, as an ordinary citizen and not a lawyer, let me tell you that I cannot help finding both arrogant and extremely dangerous the assumption by policymakers that fundamental rights are a *matter of policy* and that it is their responsibility to tamper with them. To violate the principle of equal treatment of individuals in the name of greater social justice is to do nothing less than to saw off the branch we are all sitting on. Civil rights are not, I contend, a *matter of policy,* and if a civil rights commission can agree on nothing else, it should agree with this.

We are, therefore, more than willing to sit down with any interested group to find effective and workable solutions to the problems of discrimination and of increasing the supply of available members of minority groups and women. We are not wedded to the old boy network; I can assure you it has never done anything for me; and we approve of all efforts to make recruitment wider, opener, and fairer than before. But there is one condition, one *sine qua non.* We must agree that we are not seeking to benefit one group at the expense of another, but seeking to benefit all of us by assuring fair treatment for all of us as the individuals we are.

Let me recapitulate the central point by paraphrasing the question raised earlier by Dr. Guerra. He asked how, in the face of huge discrimination, any solution other than large-scale Government intervention was possible. But, if as now appears, discrimination is *not* huge, should we not conclude that large-scale Government intervention may be mistaken? Thank you.

CHAIRMAN FLEMMING. Thank you.

Now I recognize Dr. Goodwin.

RESPONSE OF JAMES C. GOODWIN

DR. GOODWIN. Thank you.

I am going to move very quickly through some materials. And I want Dr. Sowell and Dr. Roche to respond perhaps in writing. Unfortunately, one of my other hats is that I am a lawyer, and I have heard a lot of nonlawyers dealing with the law today in a very interesting fashion. I don't want to speak to that; I want to move ahead.

First of all, I want to commend this Commission for its own reports on the functioning or the lack of functioning of Federal agencies; and I think your report is particularly fine in describing the way EEOC, HEW, as well as the Department of Labor, functioned in the area we are concerned with today. Your executive director and the staff of the Commission are entitled to high marks for that performance.

In addition, I hope the Commission does offer testimony before the Department of Labor in the continuing hearings. I understand they will be going on until the end of September. And I think they could use your critical insight; and so I hope you perform that function before that body.

Lastly, I want to say that I am impressed with your fairness in terms of the variety of the participants. I think you have done extremely well, particularly in terms of The Committee on Academic Nondiscrimination. The committee is well represented with Professor Todorovich, Professor Sowell, Professor Borgatta, and Professor Seabury. It seems you are being very fair to all sides in this matter. I think you should be congratulated for that as well.

Let me expand the perimeters of affirmative action: In fact, there are four areas of affirmative action on campuses. One of the areas deals

with what we call external affirmative action (e.g., construction and vending contracts, bank deposits, insurance, leases, etc.—any relationship in which the university has a contract with an outside party). A second area is called student affirmative action. A third area applies to what we call the staff (nonacademic) employees. The industrial model fits, generally, the staff employees of a university.

At this consultation we have limited ourselves to the fourth area—the one dealing with faculty. Some members of the academy feel that they should not be held accountable by Federal agencies for equal employment opportunities.

A government committed to ensuring that it does not subsidize discrimination among its contractors cannot rightfully exempt contractors simply because their business happens to be education. Experience with nondiscrimination laws, State and Federal, has invariably shown that little or nothing happens so long as the employer or institution is not held accountable for measurable results.

Most of us understand the concept that accountablity is fundamental to ensure quality and is an aspect of morality. I think in the case of Dr. Roche it is not necessary. He has a small college that does not have any Federal contracts.

In Dr. Roche's paper I only have one comment; he mentions, and I will quote the language:

> Samuel H. Solomon, special assistant to the Office of Civil Rights, has already investigated a number of cases and has discovered a number of American colleges and universities are engaging in reverse discrimination favoring women and minority candidates for faculty and staff jobs over equally qualified or better qualified white males.

Now, I am concerned, of course, about the "equally qualified." When a selection is made between two candidates who are equally qualified and one selects the minority or the woman, why is that reverse discrimination? Professor Sidney Hook and I have always held the same view in this particular regard, even though we are not in agreement about other aspects of affirmative action. Professor Hook has been of the view that, where there are two equally qualified candidates, the minority or woman ought to be selected to support the principle of role models, that we ought to appropriately increase the number of role models for minorities and women, and that this is one way of doing it. In this connection, I will submit an excellent article by Professor Tidball, entitled, "Perspective on Academic Women and Affirmative Action." By the way, there are a substantial number of instances where the candidates are relatively equal and where the final choice goes against the minority or woman. Lastly, with respect to Dr. Roche's paper, I have been informed that Mr. Solomon's activities into

the area of so-called "reverse discrimination" have been discontinued for lack of sufficient legitimate interest.

I find myself wishing that those who are so concerned about the possibility of "reverse discrimination" would devote equal effort to ensuring genuine equality of opportunity for all groups in higher education.

Now I switch quickly to Professor Sowell's paper. I don't understand the paragraph where he says, "The courts have not gone as far as the administrative agencies in forcing numerical goals and timetables on employers." Also, he says, "Only a very small proportion of blacks meet the standard requirements of a Ph.D. for an academic career. Less than 1 percent of the doctorates earned in the United States are received by blacks."

My concern with Dr. Sowell's paper is that he does not tell us why. He tells us that the percentage of blacks is terribly low, but there is nothing in the paper which speaks to "institutional racism and sexism." The words are not mentioned in his paper, or what conditions produced such small number of blacks, and more importantly, how can we overcome this adverse condition? I feel that is terribly important and that he should speak to it. I should state that my sources of information indicate that the present number of available black persons is significantly higher than Dr. Sowell's paper would project.

Further on he says, "It is also consistent with a larger study by Professor Finis Welch of UCLA, which showed a much higher rate of return to education by younger blacks than older blacks, both absolutely and relative to their white counterparts," and then there is a citation number. You then go to the back of the paper to look for the full disclosure of the citation, but nothing is indicated. There are a number of instances like this in his hastily drawn, often repetitive, slick, uneven, and shoddy paper.

I am going over his paper as quickly as I can.

Also, further on, at the beginning of the paragraph on academia, he says, "The central assumption of 'affirmative action' programs is that 'underrepresentation' of minorities or women represent employer 'exclusion' rather than different career characteristics of groups or different choices by the individuals themselves." The concept of institutional racism and sexism is beyond his vision. His statement needs at least more amplification; he comes dangerously close to blaming the victim.

CHAIRMAN FLEMMING. Could I interrupt a minute because Commissioner Horn will be leaving in 15 minutes, and he does have a number of questions he would like to address. Now, I am staying, so we will complete the record without any difficulty. But I would like to give Commissioner Horn an opportunity at this time.

VICE CHAIRMAN HORN. Thank you, Mr. Chairman.

First, I would like inserted in the record a statement by Dr. Robert Randolph, president of Westfield State College. It is a short statement, but I think it reflects some of the problems confronted by institutions that are responsible for the education of one-fourth of all the students in higher education.

CHAIRMAN FLEMMING. Without objection it will be inserted in the record.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

VICE CHAIRMAN HORN. Next, Mr. Chairman, there has been a very interesting exchange of correspondence which members of the Commission are aware of between Professor Todorovich and Mr. Glickstein, and I would ask that both individuals be consulted as to the degree to which this exchange of correspondence could be entered into the record. I think it raises some very worthwhile points which would be of interest to the Commission in preparing their findings and recommendations.

CHAIRMAN FLEMMING. I will ask the staff to contact both of the writers. If they don't have any objection, the correspondence will be entered in the record at this point.

[The material referred to is on file at the U.S. Commission on Civil Rights.]

VICE CHAIRMAN HORN. Now, I would like to ask one general question, starting with Professor Sowell, whose paper I found very interesting; and I look forward to your reaction to the comments that have been made on it. But to me, one of the basic questions I would like to put first to you and then to your colleagues is this: What rationale can you provide as to the necessity for the doctorate if one is to serve on the faculty of an American institution of higher education when there are perhaps only 300 or so, slightly over 10 percent of the 2,556 institutions of higher education, which grant the doctorate themselves? Is there a rationale? It seems to me this is one of the fundamental problems.

DR. SOWELL. I don't understand the question at all.

VICE CHAIRMAN HORN. The question is simply this: The argument is made that one should have relevant work experience and should be able to cite some objective standards of the work to be done. And the question is raised; and I am just interested in enlightenment as to the degree to which the doctorate is relevant compared to most of the activity that is pursued by faculties in American institutions of higher education. Most institutions are oriented much more toward teaching than they are toward research. Most institutions are educating individuals through the bachelor's degree and perhaps the master's. And, as I have said, perhaps 12 percent or so are educating individuals through the doctorate. Therefore, I am just curious as to the rationale you would offer as to the necessity for the doctorate.

DR. SOWELL. Basically I would not offer a rationale. The question is not so much *how* do you decide this or that. The question is: *Who* shall decide this or that? And the question is: Should it be decided by people making this their lifelong work or should it be decided by people in a political or administrative office in Washington?

If someone were to come to me and ask me, "Do you think there are too many universities and colleges requiring a Ph.D. for purposes for which a Ph.D. is not appropriate?" I would say there probably are. But the other question is not whether I shall take it upon myself. The question is whether or not these institutions, the people who make this their lifelong work, whether they should determine for themselves.

VICE CHAIRMAN HORN. Thank you.

CHAIRMAN FLEMMING. Professor Ezorsky?

DR. EZORSKY. On the question of the doctorate, I think it is important to remember that people who do research, and the doctorate is a form of research, are usually not going to make a living through that research paraphernalia. I don't know how you can evaluate it unless he has proven himself competent in that field.

Unfortunately, teaching, good teaching, cannot be observed like research can. So there are good teachers who do not get rewarded. If you write an article on your specialty, the man in the office next door may not understand whether it is any good or not. But someone in England or France, in that specialty, can tell you whether it is good or not. And over the years that is what determines the quality of your thinking.

If you run a test by having the students themselves tested in their field, then that might be some test of teaching effectiveness. But to believe you can stand there and see it with your own eyes, I don't think so.

VICE CHAIRMAN HORN. Let me make some concluding comments that you can address yourself to at an appropriate time. Professor Sowell, let me say I have one quibble with your paper where you say, "intact husband-wife families outside the South have achieved income parity." These are black families. I believe that is probably because in the case of the black family, as opposed to the white family in similar circumstances, the woman is usually working, whereas the white woman is not usually working.

DR. SOWELL. That objection has been made, but also there has been a study of those families where both the husband and wife are working, both among blacks and whites, and the results are substantially the same.

VICE CHAIRMAN HORN. My other concern is that during the course of your remarks you mentioned you felt that a local labor market in academic terms might be relevant. And I would ask you this: Given the national situation of the job market in American colleges and

universities, aren't we really faced with a national market in almost every discipline because the quest for jobs is so great in most diciplines?

DR. SOWELL. My remark was intended to convey the idea that it might vary from institution to institution. There is some evidence that southern schools have a certain localism in terms of the kind of faculty they attract. But certainly that market may vary from the local to the international. That is the point I am trying to make. And I think in terms of the kinds of institutions you are talking about you are right.

VICE CHAIRMAN HORN. My only other question would be—sometime, I hope, President Roche, before the afternoon is over, you will explain to what degree should the president of an institution bear the responsibility for meeting affirmative action goals and perhaps describe how hiring occurs within a university, as to who makes the recommendations, at what point decisions are made, and so forth.

CHAIRMAN FLEMMING. I would like to go back to the procedure we were following. At the present time I would like to recognize Dr. Goodwin so that he can complete his remarks. Then I will go to the final reactor, Dr. Guerra, and then come back to Dr. Sowell and Dr. Roche for any comments they might want to make before I address any questions to the panel that I might have in mind. Possibly by the time we have gone through that whole process, all of my questions will have been answered anyway. But go ahead, Dr. Goodwin.

DR. GOODWIN. With respect to Dr. Roche's approach, I read his part of a book entitled *The Balancing Act,* and I was amazed that he could write all 92 pages about the "lust for affirmative action" without a single citation of authority. I would like somewhere along the line for him to give us his own definition of goals and quotas. I know somehow he knows those two words are not synonymous. I'm sure he has looked them up in Webster's dictionary or some other place. They clearly are not synonymous terms. And I would like him to define them to his own liking.

And now, switching back to Dr. Sowell's paper, he says, and I quote: "In short, it was *antidiscrimination* or equal opportunity laws, not goals or quotas, which made the difference."

My problem with the statement is a personal one. I don't think it is the equal opportunity laws that made the difference, but minorities and others who have for some time protested, put their bodies on the line and forced the country to a new consciousness in human rights, and "forced" those laws into existence. I just resent the argument that it is the law rather than the people that caused the law to come into being, as the main focus. It deprecates my people, and I think his too. Firm political leadership and popular concern over the depressed status of black Americans, fostered by both black militancy and the civil disorders of the sixties, created a climate in which Federal programs were aimed at ameliorating conditions among the disadvantaged. The affirmative action program was only one of several, and it is difficult to

assess precisely its role alone in achieving such improvements as have occurred. The rising educational level of the minorities, the effect of Federal and private manpower-training programs, antipoverty campaigns, as well as antidiscrimination measures, whether passive or affirmative, undoubtedly all contributed to the improved situation.

Lastly, a comment which speaks to his lack of knowledge about law. He talks about a constitutional issue with regard to what is known in law as the "burden of proof." There is no such subject matter as the "burden of proof" in the Constitution.

Dr. Sowell states: "Since academic disciplines have their own respective professional organizations—the American Economic Association, the American Sociological Association, etc.—these organizations could readily supply panels of experts to review the reasonableness of the decisions made in disputed cases."

I don't think this notion is too promising. For one thing, it is unlikely that professional organizations would be interested in doing this job, and for good reasons. To determine whether a department and a college are indeed guilty of discrimination in denying reappointment or promotion requires more than a knowledge of the particular discipline. For excellence in scholarship, which is all that can be judged by such a review committee, does not in itself obligate a department to grant tenure or promotion; nor does the lack of scholarship necessarily justify nonreappointment. It all depends on the particular department and the particular college. Discrimination can be said to exist not when a good chemist or philologist is turned down, but only when the individual is being judged by standards that are different—that is, higher—than the standards employed to judge her colleagues. And to determine this, one needs to know the recent history of the department—the politics surrounding the nonreappointment.

A committee of outside scholars also would be inclined not to question the judgment of senior colleagues who have turned down the individual for tenure or promotion. Senior professors, for the most part, believe that no one should be forced on a department even if he or she is quite superior academically. There is still a feeling among many in your profession that one should not want to remain in a department in which one is not welcome, any more than in a club.

When, further on, you [Dr. Sowell] deal with the concept of levying fines, I would be interested in your idea of incentives, other than money, academia might be moved by. Those are, quickly, my comments on these materials, which I think seek to further perpetuate the twin myths of equality and nondiscrimination.

CHAIRMAN FLEMMING. Thank you very much.

DR. GOODWIN. I have a few other comments.

Universities and colleges are unique institutions in the sense that they are the creators of availability for themselves as well as the public and private sectors generally. We provide statistical data and information

to the Department of Labor for which industry is held accountable for affirmative action goals and timetables. Universities are uniquely situated in such a way that they can develop and grow their own goals and timetables.

We have in our own student body the very stuff that it takes to make the kind of diverse faculty member we are all interested in substantially increasing—that is a unique difference. As Caspar Weinberger states, "This is particularly true because of the fact that colleges and universities for the most part control the access of persons to the academic employment pools from which they recruit."

In a democracy, an institution of higher education or any institution that deals with the concept of education must be a moral institution. Moral institutions have a responsibility to teach by example, and I must say the example of faculty these days in the area of affirmative action is one generally to be lamented. It is ironic that the academic community, which has for so long been the champion of liberal causes and the advocate of such civil rights as equal employment opportunity, should be so slow to root out its own discriminatory employment and admissions practices.

I think there is serious need for a redefinition of the word "quality." Another misconception about affirmative action that always has offended me is the talk about maintaining standards or lowering standards. The purpose of affirmative action is to raise standards. Standards are not only raised by an honest, broad, innovative search of all the competent minority and women candidates available but by the establishment of diversity in our faculties, consciously cultivated. The very point Dr. Guerra was speaking to in terms of cultural values, and the recognition that cultural values lead to different kinds of ethical commitments and those ethical commitments I think, at least in the cultures I am associated with, can provide the medicine to bring the country around. Academic departments, generally, seem to lack the internal moral force or drive to see affirmative action as a natural, moral imperative necessary for their healthy survival. I'm biased. I am an affirmative action advocate, and I believe in the moral necessity of change and in a heightened social responsibility. I criticize the lack of past performance of institutions of higher education because I am endeared to them and want to raise their level of moral dignity.

Unfortunately, Federal agencies tend to promulgate policies and practices for higher education that do not fully grasp the institutional and structural difficulties of change and, therefore, are not likely to attain the appropriate levels of effectiveness in implementation. In short, affirmative action programs are not empirically grounded in higher education. There are unique institutional paradigms that need to be understood by lawmakers: Universities, for example, have broadly distributed power bases, varied and unique departmental structures, differential internal rates of growth for colleges, schools, departments,

centers, and institutes, and unusually complicated staff and faculty development strategies.

I think the most crucial thing the Commission can recommend is a full and equal employment opportunity policy in jobs that impact on the equality of life in a planned economy. It is uninspiring to talk about affirmative action when people are being laid off. The concept of affirmative action is to get into jobs. If it is proper, I would recommend that the Commission help support the concept of full and equal employment. I think the white masculine resistance to the claims of minorities and women is far more ancient and deeply rooted and irrational than this year's job market.

I will end with saying that specific tactics for impeding affirmative action in universities can be organized into at least five categories: (1) obliterate, deny, or contain responsibility for affirmative action; (2) delay responsibility for implementation; (3) engage in efforts designed to fail to produce minority or women recruits; (4) engage in recruitment efforts producing minority and women candidates who will subsequently be caused to fail; and (5) delegitimize minority and women candidates.

The first group of tactics focuses on the definition and location of responsibility for affirmative action. These tactics deal with both formal organizational processes and with the informal culture.

The second group deals specifically with delaying the implementation of organizational and personal responsibility for affirmative action. Once responsibility is established and engaged, a third set of tactics is used to ensure that recruitment activity will not be successful. If such an activity is successful, other tactics are employed that minimize their opportunity for advancement.

Finally, there is a general set of tactics which support and extend the above-identified behaviors by directly delegitimizing women and minorities. The games and tactics utilized are interlaced and can all be connected up. In the interest of time, I submit my article in the July 15, 1975, issue of the *Women Law Reporter,* and an excerpt from pages 7 and 8 of Florence Howe's introduction to *Women and the Power to Change.* Let me close with this.

America is a very conservative society, which likes to claim that it is devoted to equality and social change. It has an educational system designed to preserve that contradiction by institutionalizing the rhetoric of change to preserve social stasis. Thank you.

CHAIRMAN FLEMMING. Thank you. Dr. Guerra?

RESPONSE OF MANUEL H. GUERRA

DR. GUERRA. Thank you very much. I have listened and participated in this conference and I have tried to put into focus what I consider to be the primary issues.

Any assessment or evaluation of affirmative action in higher education today must first of all reaffirm the existence of adverse conditions upon which its own existence is predicated. All three authors and position papers seem to agree that something is wrong in academia. But there is a wide disparity of thought between that of Dr. Roche and Dr. Sowell, and the thinking of Dr. Sandler. The former do not persuade us that the existence of bad conditions in academia are anything but the result of affirmative action, or that they are caused by minorities and women themselves. Their dichotomy begins with an admission of discrimination on the one hand, and a refutation of discrimination on the other. Meanwhile, Dr. Sandler states that the simple acknowledgement that there is a problem is indicative of progress.

Inasmuch as I concur with much of Dr. Sandler's paper, I must, nevertheless, agree with the basic premise and frame of reference of all three papers in one important regard: The defensive psychology and syndrome of guilt and recriminations upon which much of their thesis is based must enter into a more open forum, which their own scholarly style and documentation promises. All three have stated their case admirably well. However, what they took for granted and glossed over so lightly is exactly the issue which divides this testimony and academia as well.

If we may put emotional persuasions aside in favor of open debate, then we must first start with the nature of the beast. If we may agree that racial and sex discrimination have been and presently are a reality on the American campus, that such social phenomena have a long history in American life, and the consequences of such social behavior have been detrimental to American higher education, then we must define its origin, analyze its function, and evaluate its damage. This conceptualization was sadly lacking in our position papers. Because if we are talking about such ugly realities as institutional racism and racist attitudes in the woof and weave of our republic, it does little good to ignore the national grip such disquietudes have on the popular consensus or the academic intelligentsia.

The full impact of this negative force upon the American mind and institutions must be fully appraised without recriminations and without hysteria. Not only do the papers of Dr. Roche and Sowell fail to articulate the true nature of the negative climate which compels Government intervention, but they reveal in their arguments a defensive desire to rebut the existence of institutional racism, ignore the widespread negative attitudes prevalent in both society and academia, and document with institutional authority the premise of their thinking. With all due respect, we cannot accept as entirely valid the criteria, researches, and conclusions of such august bodies as the American Council on Education, the National Academy of Sciences, and the Carnegie Council report; not because they lack prestige, scholarliness,

or worthwhile academic influence, but because they are hardly representative of the valid area of scientific inquiry concerning minority and sex discrimination in higher education. Their traditional criteria and rationale does not depart from the same sources of problems which demand new understandings. Yet, all three papers have quoted these sources to substantiate their respective positions.

Affirmative action needs affirmative conviction, and this conviction, as an act of intellectual faith, upon which all arguments are based, is sadly lacking. Indeed, if the opposite were true, and such conviction were in fact an intrinsic part of the thinking and feeling of both Messrs. Roche and Sowell, they would not challenge the basic reasons for affirmative action, Government intervention, or the experience that does not require a Ph.D. to perceive.

In fact, they would not ignore the language and culture problems of 20 million Americans, the second largest minority, the Spanish-speaking Americans of the United States, of which the Mexican American Chicano community constitutes more than 15 million. The language and culture problems of the Puerto Rican, Mexican American, Cuban American, and Native American tribes and cultures is ignored in all three position papers as if they did not exist, as if bilingual education were not one of the most important undertakings of the 91st and 92nd Congress, and surely one of the most innovative programs to affect American education since the NDEA [National Defense Education Act].

Those who find it difficult to document educational inequities and lack of educational opportunity should turn to the needs of bilingual Americans to find their faith. The Supreme Court decision, *Lau* v. *Nichols,* has defined the need for language and culture education for those with such disadvantage. And the publications of the Civil Rights Commission, *Toward Quality Education for Mexican Americans,* Report VI, February 1974, and *A Better Chance to Learn: Bilingual-Bicultural Education,* Publication 51, May 1975, document the sources, define the laws, and prescribe the programs which every American interested in affirmative action for all should carefully read.

Today, Mexican Americans have the highest dropout rates among minorities. Mexican Americans are the least represented in educational boards, councils, and trusteeships. Mexican Americans have the lowest percentage of college graduates of any minority per capita. Mexican Americans have the lowest representation in the United States House of Representatives according to their population. Mexican Americans have had the highest casualties in the last two American wars, according to their total number. Mexican Americans have a disproportionate representation in the student bodies, faculties, and administration of the Southwestern States. Indeed, there are universities in California that espouse the good faith of affirmative action, but their track record reveals that they have not hired competent faculties from

the pool of professional Mexican Americans; and, when they do, they do so at the lowest rank, the lowest pay, the nontenure track. All this in a State with 2 million Chicano taxpayers, who in some counties underwrite the largest share of the educational costs.

However, administration has been blamed for both adverse conditions on the campus and misunderstandings of affirmative action guidelines. Only the paper of Dr. Sandler places the proper blame on the doorstep of HEW and the Office for Civil Rights. Her analysis deserves honorable mention for stating what many people have experienced as a disappointing function of a civil rights agency. The constituencies of HEW and the EEOC are indeed different, and each serves its respective interests. Any evaluation of affirmative action in higher education must carefully weigh the record of each and determine whether or not they are properly discharging their responsibilities with impunity and commitment. Perhaps a congressional investigation will some day corroborate the obvious truths which our bureaucracies take great pains to deny.

Our three authors have documented extremely well the Civil Rights Act of 1964, Executive Order 11246, 11375, Title VII, Title IX, and several legal cases which substantiate their point of view. However, it is highly disturbing to some to have the traditional halls of ivy threatened by the cactus saguaros of the Spanish-speaking Southwest. The flora is different, but the walls are the same.

For example, as I have stated, the traditional frame of reference concerning women and minorities stems from a background which subscribed to the melting-pot theory of American society and education, oriented toward criteria and standards which do not incorporate the social realities of modern American life. The best example of this may be found in the paper of Dr. Roche with regard to student admission standards. Dr. Roche laments the lowering of admission standards to achieve racial balance, if this were true, we would all lament it too.

But Dr. Roche ignores the inconsistency of this anxiety. The liberal arts colleges of our institutions have traditionally defended the study of foreign languages, or second languages as they are called. Both admission requirements and graduation requirements for the bachelor's degree often uphold this requirement. Requirements for the master's degree and the Ph.D. often espouse the merit and necessity of such linguistic proficiency. This is as it should be in a world growing smaller through the advances of science and technology. However, the disadvantaged bilingual who knocks on the door of admission finds to his dismay that the liberal arts institution does not accredit at admission his bilingual proficiency. Nor does the college prescribe an examination of his linguistic assets. On the contrary, the bilingual is told that his domestic language is poor, worthless, and inadmissable.

Thousands of bilingual students have been denied entrance to their State universities because they have lacked the academic points which were necessary; however, their bilingual abilities which would have given them these necessary points were never appreciated by the admission standards of the institution, which, on the other hand, requires the same language study which the bilingual has learned from his home. It is precisely this definition of academic standards which comes under scrutiny by affirmative action and, if the admission of this talented American is in fact an act of lowering academic standards, then I will indeed "eat my sombrero."

This policy which I have chosen to use as an example is a salient and common form of the discrimination against Mexican Americans and other bilinguals by traditional academic standards which have served to deprive and isolate Americans from equal educational opportunity.

In summary, the essential issue of affirmative action and its good or bad effect must, first of all, correctly ascertain the devastating, adverse conditions prominent in higher education, their origin, causes, and consequences. Recriminations are not as important as solutions, and solutions cannot be found without acknowledgement of the realities which defeat higher education. Racial and sex discrimination are a common social malaise of which American society is unfortunately the victim. The American campus, both public and private, is not an autonomous society without accountability to the leaders and laws of a democratic people. Affirmative action as a contract relies on the good will of both parties and cannot substitute the sincerity of purpose or its reason for being for the machinery of bureaucratic deception or the subterfuge of the institutional status quo. Indeed, affirmative action needs affirmative conviction and, without the proper conceptualization of the complex problems, there can be no relief. Many of the prestigious academies sadly need reform and reassessment themselves before they can share their expertise in those areas that match their scholarly reputation.

Bilingual Americans and their educational problems are commonly ignored in eastern conferences such as this, and their problems are no less critical or pressing. The discrimination against Mexican Americans in the United States, both in society and higher education, has been corroborated by the publications of the Civil Rights Commission and scholarly studies, and by analogy upheld in the Supreme Court decision on bilingual Americans, *Lau* v. *Nichols.* Administrators, the office of HEW and the OCR, have been identified as delinquent in their respective duties. But in all fairness the traditional faculties of the American academia must share the burden of blame for the opposition, procrastination, and defeat of affirmative action efforts in American colleges and universities, where white male committees officiate as champions of democratic procedures and academic fairness. The fact that no college or university can claim an appropriate faculty

representation of competent women and minorities substantiates the claim that something is wrong with the affirmative action program in higher education. Competent women and minorities have not been hired in any great numbers in any institution of higher education, despite the claims of reverse discrimination and the criticism of both administrators and the traditional faculty.

Perhaps Dr. Sandler did not evaluate the negative effect of marriage upon the availability of women scholars, a fact which deserves more scrutiny, as Dr. Sowell has stated, but Dr. Sandler is correct in raising those pertinent questions which challenge the validity of arbitration without due legal process.

The fact remains that millions of Americans are denied equal educational opportunity for many reasons which are arbitrary and capricious. Working in the office of the Honorable Commissioner Manuel R. Ruiz, many of these cases have been brought to our attention in California, where poverty in the agricultural fields and the barrios of East Los Angeles combine with discrimination to repress the human spirit. Affirmative action is not a panacea for the afflictions of higher education; indeed it has many faults. But none of the alternatives are any better. Like American laws, there is little wrong with them. What is wrong is that they are not practiced or enforced. If affirmative action can help to bring millions of Americans to the mainstream of national life, and help them participate in the quest for personal fulfillment, our society will bridge the past with a new and hopeful future.

DISCUSSION

CHAIRMAN FLEMMING. Thank you very much. As some of you know, I spent a number of years where I had the opportunity of serving as the presiding officer of faculty meetings. I felt at home here, both in terms of the method of presentation and also from the point of view that there have been sharp differences of opinion. There have been some very direct exchanges here in terms of the comments, specific comments that were made relative to Dr. Sowell's paper, particularly. I am going to suggest that as one method of proceeding, in view of the fact that we only have a very short period of time remaining, we would be very happy to provide you with a transcript of the record at that particular point. So if you want to include a memorandum in response to those comments, we would be glad to have you do it. Or if you want to do it by making a general comment now, fine. So why don't I call upon you for brief general comments on all of the dialogue that has taken place since you presented your paper. Then I will call on Dr. Roche for the same.

DR. SOWELL. I won't attempt to answer in detail, since I have a plane to catch tomorrow morning. Some questions have been run through fairly quickly. I have already given Mr. Goodwin the citation

for Finis Welch's article which is the *American Economic Review* for December 1973. I think it is a landmark article. There was a question raised by Mr. Goodwin about, why the low percentage of blacks? It struck me as I wrote it and, again, as I sat here that I imagined that everyone is familiar with the history of blacks in the United States—and that that would be more than a sufficient explanation.

The citation that he took exception to had really one point to make, and I will read it over and see if it can be made more clearly. And that is that blacks have not been the beneficiaries of gains conferred by affirmative action. Blacks have achieved what they have gotten simply by having some of the discriminations lifted.

And I, too, say that with a certain amount of pride in the group to which I belong, with or without Mr. Goodwin's permission. I plead guilty to being a layman in the law. Going on to Dr. Ezorsky's comments, she mentioned something about snipping things out of context. Immediately before the citation which she found so objectionable, there is another citation of the same character; and there were many others. My argument is not the point of Lester having picked the right person who picked the right person and so on. The point I was making is that statistical disproportions are not the same thing as solutions. You say that there are two plausible explanations. And then you ask. "What is my evidence that one is better than the other?" The question is not what my evidence is. The question is: "What is HEW's evidence?"

Then on marriage, there are so many others. The Astin studies, the longitudinal studies also cited in the paper that show during this period that the marriage rate among women was rising and the birthrate among white women was increasing. In terms of the percentages as cited against me, there are some problems in the beginning of that book when a substantial proportion of the women were left out for reasons having to do in some way with withdrawal from the labor force. Therefore, I did not use the figures of the remaining group.

Finally, she ends up saying that there is some kind of special sexism against married women as against single women. I find that a novel notion that there is some pervasive sexism which, for some odd reason, exempts single women. Then there is some reference to men in the military in the South Pacific. We haven't been in the South Pacific for 30 years. I am not sure that the women at home with children are really doing quite that much scholarly work.

There are also some studies concerning the notion of married versus unmarried. One of the problems with some of those studies, I believe it is one of those you cited, is that there are substantial differences between those persons who were never married and those who are single in the sense of including those never married, those widowed, divorced, etc. And for some of those studies, I did not use them because

their definition was different from the one I picked up, of never being married, because that really got at what we are talking about.

CHAIRMAN FLEMMING. Dr. Roche?

DR. ROCHE. As usual, in situations of this kind, you mentioned the analogy of the faculty. There is sort of a variation of comments going in all directions. But there are four or five from that which I would like to address.

First of all, Dr. Guerra made several points, I thought, of special interest. He made the statement, and please correct me if I am wrong, that no college in the United States has to address itself to a proper balance of hiring a black minority or women. And you went on pointing out that therefore some governmental action was necessary. Since you opened the door to this, moving from the general to the particular, I can tell you that at Hillsdale College we have women heads for elementary education, early childhood education, English, bilingual education, teacher placement, our art department, our publications department—we are not doing badly. And I might add that we are not covered by affirmative action in its present form and intend to remain in that situation.

You also mentioned the young people who, because of their Spanish American background, are discriminated against in some fashion or another. Again, I insist this is not necessarily or always the case. When a college closed in the State of New Mexico, when a small private college closed in New Mexico several years ago, we made arrangements at Hillsdale to ship students and baggage, students wishing to continue their education, to Hillsdale, including a number of minority members.

Finally, this business as to their language concerns me. Please tell those people roughly treated who did not have their second language, Spanish, recognized, we will not only recognize them at Hillsdale; but, if they drop out, we will offer college-level credit for that on the assumption that they have already attained a higher level than required in our classes.

CHAIRMAN FLEMMING. Thank you. Now, if there are any further responses to comments that are being made, we will welcome them. But we would prefer a memorandum that we can insert in the record at this particular point. I'm sorry that we have to recognize time limitations. But I do have a time limitation that I have to honor.

DR. ROCHE. If I may move on to Dr. Goodwin's comments for a moment. Several times today we have talked about very nebulous terms, that of academic quality. In fact, Dr. Goodwin specifically said, "Where do we find this academic quality?" I think I can say without being too facetious that he provided that answer for us by naming a number of citations.

Furthermore, on the question of the matter of discrimination and how we measure it in some fashion or another, remember the passage in

my paper that Dr. Goodwin quoted by Samuel Solomon and the investigation of cases in which he felt discrimination was present. The point, as I understand it, that you were complaining of was this reference to "engaging in reverse discrimination favoring women and minority candidates for faculty and staff jobs over equally qualified or better qualified white males."

Finally, this definition of quotas and goals—now, this is without the benefit of a dictionary; I must confess I have not looked the words up. But the sense in which I have been using them here is a goal to me establishes a sense of direction, something toward which an effort should be made to achieve something. A quota, on the other hand, carries an additional burden of enforcement or specific demands, not merely that that goal be strived for but be specifically achieved. That is the frame of reference I am working with.

One final point—Dr. Goodwin told us that what we are working toward in affirmative action was proper or fair employment within a planned economy. Another point in your remarks was that you accused our present society of deliberately preserving a social stasis. May I say that I agree with you, as hard as that may be to accept, in this case, and that is that I agree that a social stasis is present.

Then your point of a planned economy, let me say I think it has a direct bearing on everything this Commission is attempting to explore. We have had a number of previous discriminations in the United States. This isn't something new. It is something that has gone on for a long time. Every term of racial or ethnic discrimination in our society has its origins in a previous discrimination which existed at some point in our past. That is where words like "kike" and "chink" and "dago" and many others come from. There has always been somebody at the bottom of the economic pyramid in the American society, and I deplore it.

But the virtue of American society at its best is that it has been open enough to allow a kind of upward mobility for those "kikes" and "dagos" and "chinks" in which the Irishman in one generation in the slums of New York becomes the Irishman three generations later who becomes President of the United States. That kind of country is an exciting place in which to live.

I submit we do have social stasis today, but that some of the bottom rungs of the ladder have been cut off. My point is simply that in one fashion or another we have subdivided the rungs of the ladder and now we are saying: What are we going to do about those people on the bottom? It is programs like affirmative action, if you want to do something about the upward mobility, we ought to do away with rather than enhance the present regulatory activity.

CHAIRMAN FLEMMING. Thank you very much.

May I, at this point, express to every member of the panel my deep appreciation and the appreciation of my colleagues for the way in

which you have entered into this discussion with sharp, differing points of view. But that is what we wanted. We felt that before we developed our testimony for the Department of Labor hearing, before we arrived at some findings and recommendations, that we did want to have the benefit of the type of contributions that have been made this afternoon, that were made this morning and yesterday afternoon.

We are deeply indebted to you, and again I urge that if you feel that there are certain comments that you still want to react to, so we will have the benefit of going over it, that you prepare a memorandum for the record.

And as one member of the Commission, I can assure you that any memorandum that does come in in that manner I will read. I am deeply interested and concerned about the basic issues that have been put on the table here this afternoon.

On behalf of the Commission, again thank you very much.